## TEXAS DEPARTMENT OF TRANSPORTATION

# TEXAS DEPARTMENT OF MOTOR VEHICLES BOARD MEETING

9:00 a.m. Thursday, May 13, 2010

125 East 11th Street Austin, Texas

## BOARD MEMBERS PRESENT:

VICTOR VANDERGRIFF, Chair CLIFFORD BUTLER JIM CAMPBELL RAMSAY GILLMAN CHERYL JOHNSON JANET MARZETT VICTOR RODRIGUEZ MARVIN RUSH JOHN WALKER III



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- 3. EXECUTIVE SESSION

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Section 551.071 - Consultation with and advice from legal counsel regarding:

- A. pending or contemplated litigation, a settlement offer, or
- B. any item on this agenda, including but not limited to the pending TxDMV/TxDOT MOU

## 4. ACTION ITEMS

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- 1. TxDMV/TxDOT MEMORANDUM OF UNDERSTANDING
- 2. STATE AUDITORS OFFICE EXAMINATION AND AUDIT
- 3. REQUEST FOR RULEMAKING FROM TEXAS AUTOMOBILE DEALERS ASSOCIATION
- 4. ADVISORY COMMITTEE STRUCTURE AND APPOINTMENT PROCESS

#### 5. CONSENT AGENDA

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- A. CONSIDERATION OF ENFORCEMENT AGREED ORDERS UNDER OCCUPATIONS CODE, CHAPTER 2301
- B. CONSIDERATION OF ENFORCEMENT NOTICE OF VIOLATION CITATION AGREED ORDERS UNDER OCCUPATIONS CODE, CHAPTER 2301
- C. CONSIDERATION OF SETTLEMENT AND DISMISSAL ORDERS UNDER OCCUPATIONS CODE, §2301.204 (Warranty Performance Complaints)
- D. CONSIDERATION OF FRANCHISE CASE DISMISSAL ORDERS UNDER OCCUPATIONS CODE CHAPTER 2301

#### 6. RESOLUTIONS for INDIVIDUAL CONSIDERATION

- A. CONSIDERATION OF A REQUEST FOR A FORMAL OPINION FROM THE BOARD REGARDING TEXAS OCCUPATIONS CODE 2301.475(c)
- B. CONSIDERATION OF PROTESTANT CARDUCO'S MOTION TO APPEAL SOAH'S STATUTORY STAY AND CEASE AND DESIST RULING Docket No. 10-0004 LIC Carduco, Inc., d/b/a Cardenas Metroplex v. Mercedes-Benz USA, LLC
- C. CONSIDERATION OF PROPOSALS FOR DECISION UNDER OCCUPATIONS CODE, §2301.204 (Warranty Performance Complaints) 10-0042 CAF - Jerry Armstrong, Complainant v. Ford Motor Company, Respondent

### 7. ADJOURNMENT

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# PROCEEDINGS

MR. VANDERGRIFF: Good morning. My name is
Victor Vandergriff and I am pleased to welcome you here
today to the meeting of the Board of the Department of
Motor Vehicles. I'm now calling the meeting for May 13,
2010, of the Board of the Texas Department of Motor
Vehicles to order and I want to note for the record that
the public notice of this meeting, containing all items
on the Agenda, was filed with the Office of the Secretary
of State on May 4, 2010.

Before we begin today's meetings, please place all cellphones and other communication devices in silent mode and if you wish to address the Board during today's meeting, please complete a speaker's card at the registration table in the lobby. We do have a public comment section, which we will take up here shortly for just any comments but, as we get to some of the items on our agenda, if you'd like to speak to those, particularly on the briefing items, then please fill out that card and note that and we will call you accordingly then.

If not an agenda item, we'll take your comments, of course, as I just mentioned, during the public comment portion of the meeting. And now, I'd like to have a roll call please of the Board members. Board member Butler?



1	MR. BUTLER: Present.
2	MR. VANDERGRIFF: Board member Campbell?
3	MR. CAMPBELL: Present.
4	MR. VANDERGRIFF: Board member Gillman?
5	MR. GILLMAN: Present.
6	MR. VANDERGRIFF: Vice-chair Johnson?
7	MS. JOHNSON: Here.
8	MR. VANDERGRIFF: Board member Marzett?
9	MS. MARZETT: Here.
10	MR. VANDERGRIFF: Board member Rodriguez?
11	MR. RODRIGUEZ: Here.
12	MR. VANDERGRIFF: Board member Rush?
13	MR. RUSH: Here.
14	MR. VANDERGRIFF: Board member Walker?
15	MR. WALKER: Here.
16	MR. VANDERGRIFF: And let the record reflect
17	that I, Victor Vandergriff, am here too. We do have a
18	quorum. With that, I would note and ask if there's
19	anyone in the audience that wishes to speak on any matter
20	that's not directly on our agenda, during the public
21	comment section. We're on 1.B. Seeing that, I will tell
22	you we're going to move out of order here today and we're
23	going to take up and we did notify the parties that
24	will be involved in these, we're going to in just a



second, move immediately into an Executive Session and

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we're going to then take up, in Executive Session, the items on our Consent Agenda, which is Number 5 and also Number 6, the items on that portion of our agenda and then Item 4.3. It should be 4.C. and I apologize. I think it's noted on yours as 4.3, so I apologize for that numbering error.

We'd like to take those up first. We may have an issue with respect to maintaining the majority of the Board here, while we have 100 percent participation, I'd like to make sure we cover those items first here. We will then come back out, after Executive Session, and handle the items I've just mentioned and then, perhaps we'll have an additional Executive Session to cover some of the topics in our briefings and other action items but we expect to try to move this along pretty rapidly so we appreciate your patience with us today on that.

Now, I would say we're not going to take a short break. We're just going to go directly into closed session. It is now approximately 9:07 a.m. on May 13, 2010. We will go into closed session at approximately 9:10 and under the following sections of the Government Code, Section 551.071, to obtain the advice of legal counsel, regarding agenda Items 5 -- all the items underneath that; 6 -- all the items underneath that Agenda Item and Agenda Item Number 4.3 and to consult



regarding attending or contemplated litigation or settlement offer. For those of you in the audience, I anticipate being in Executive Session, I really don't know. I wish I did but I would say at least 30 minutes and we will reconvene in open session after that.

With that, we are adjourned from the public meeting and we are into Executive Session.

(Whereupon, the Public Meeting was adjourned into Executive Session.)

MR. VANDERGRIFF: It is approximately 10:24

a.m. on May 13, 2010, and the Board of the Texas

Department of Motor Vehicles is now back in open session.

We do want to note, for the record, that no action was taken in closed session. And with that, I would move to Agenda Item 2.F., which is a presentation from our General Counsel, Mr. Bray.

MR. BRAY: Mr. Chairman, Members. When this was presented to me by the Chair, I wasn't exactly sure what was wanted because you all have had training over and over again on some of these issues but then it occurred to me that the Board training that you get at the beginning is fast and furious and then more training comes after that and you go back home and conduct your lives and -- whereas somebody like me lives here and processes every single day, you don't. And so, I think,



what the Chair had in mind and what I'm going to try to 1 do in a very brief period of time is a refresher course 2 on some of the different hats you wear and roles you play 3 as Board members, aside from your overarching one of 4 5 policy making for the Department of Motor Vehicles. MR. RODRIGUEZ: There are two "F"s; which one? 6 MR. BRAY: And I apologize. 7 MR. RODRIGUEZ: 2. G -- 2. F. F.? Is that the 8 9 one --10 MR. BRAY: I'm doing the one on Process and 11 Procedures for Conducting Administrative Hearings, Requests for Formal Opinions and Rulemaking. It actually 12 13 should be "G" but it's Number 2 F. As Board members -- and there will be people in 14

the audience and on the web that will say, Well, he didn't cover this aspect of it or that aspect of it. trying to give a very global overview, if you will. I'm certainly open and will try to explain anything I can and answer any questions I can.

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Generally speaking, what you have is a hearing you are judges. In ways, you're really more like jurors; in some ways you're more like appellate judges, but judges nonetheless.

And what happens in the beginning is, in that flowchart, what you'll see, it says, "Complaints



Received." Well, there's two types of those. You'll get a complaint from a consumer or another dealer or somebody about a licensee that has violated the law or you'll get a complaint by a consumer that their -- well, for example, he'll have a doctor in Kerrville who's had his Porsche in for service in San Antonio 16 times, for a total of 67 days and he believes he qualifies under the Lemon Law and he will file a complaint. And there's that type of complaint.

And then, thirdly, there's the type where the agency, including us, as staff as well as you as Board members, will act as nothing more than a forum and that Is -- I shouldn't say nothing more, it's a very important function but will act as a forum and those are things like protests and complaints by one licensee against another. There's a whole series of provisions that deal with the relationships between various entities in the distribution industry; i.e., dealers and manufacturers and distributors, by and large.

So that's what happens if something comes in as a complaint or a protest, et cetera. It's reviewed.

It's scanned. If it's the first type, if it's an enforcement matter, it goes to an investigator and gets investigated. If it's a Lemon Law case, it goes to a



Consumer advisor. They gather the facts and move forward with it.

When it's a protest or a complaint by, say, a dealer against a manufacturer, there's not that much for the staff to do, other than move to the third box, which is: Prepare a Notice of Hearing because those kind of complaints are by individuals that by and large have lawyers and they are parties to conflicts, civil litigation, that, again, you are the judge on.

A Notice of Hearing, for your purposes, you should think of it like the summons, an original petition in a civil suit. That's what starts the case. It notifies the parties when, where and how the case is going to be heard and what the case is about in the most basic and general of terms.

Cases now go to SOAH, State Office of

Administrative Hearings, and there's a lot of things that
go on around that box, in terms of prehearing matters and
discovery and all the things you think of when you think
of lawsuits. But, in the end, what happens is, the SOAH
Administrative Law Judge issues a Proposal for Decision
that then comes to you.

When that proposal comes to you, so do the Exceptions and the Replies and sometimes the Responses to the Replies and the Surrebuttals to the Responses and on



and on and on but, ultimately, you get a large bundle of material about -- that has a recommendation by a SOAH ALJ and complaints by one or both sides about why the SOAH ALJ did it wrong or did it right.

That next box talks about a Final Order being issued. That's you and that's in an open meeting, upon hearing Oral Argument, usually from the parties, you'll issue a decision. Now, there are lots of cases again. I'm trying to short-cut this. But there are lots of cases where that's pretty easy. They're in the Consume Agenda.

People don't show up for hearings, they default, people agree to a result, get an Agreed Order; all those kind of things are ministerial, pretty much, and you all can pass on them in bulk. It's the ones that don't do that where you're going to hear contested cases. You are judges.

Unlike the other two processes we're going to talk about, you need to think of yourself as judges. You need to be -- this is the one area where you have to be super cautious about ex parte communications. This is the one you have to be super cautious about anything that doesn't feel right. Unlike the other two areas I'm going to talk about, if something doesn't feel right, my



general advice, given the time constraints is, run the other way and seek counsel.

The next box talks about what happens after you've issued an order. And, this is kind of important because I have even been caught in this trap before. There's a period of time where you file a Motion for Rehearing. It gives you, the Board, an opportunity to find out why they think you're wrong and for you to fix it; to change your minds and fix it before they have to go to the Courthouse and get somebody to tell you you're wrong. It's your opportunity to re-review your Final Order.

The reason this is kind of tricky is because a lot of people, after you've been through this process and you've gone through and you've heard the oral arguments and you've debated and deliberated and you've made your Final Order and you go, Whoop, that's that and you think you can go off and start discussing the case and, Well, we made a good decision this time and did you think about this and did you think about that? Well, for the next so many days until the Motion for Rehearing comes in and then you've acted on it, it's still a live case and it's in your lap and you need to take the same precautions that you would beforehand. So, when you think you're

done with the case, be very, very careful because you're probably not.

Once the Motions for Rehearing have all been resolved, in one way or the other, then it does go to the Travis County courts. There's a twist to that. But, generally speaking, by and large, the case goes up on appeal through the court system in Texas.

And that's yet another problem that you need to think about. And so, my best advice to you is you're better off not discussing the work you did. It's just moving on to your next piece of work because there have been times -- it's been very few. I'm proud to say that, generally speaking, the matters we've been involved in don't get -- don't lose on appeal very often but there have been times when things have been sent back to the Board. So you don't want to be in the position of having cussed and discussed a case that you've decided and then it gets poured right back in your laps and you need to have been unbiased, untainted, if you will. If I can get my slide back, we'll move to the next one.

I believe the next one is going to be the Formal Opinion process. The other two we're going to talk about are Formal Opinions and Rulemaking. Back up. Let me go to Rulemaking first. Rulemaking, at an agency level, you're familiar with what that is: You make



rules. I like to think of it in terms of the hat that you wear. It's different. You're not a judge. You are really a legislator. A Texas Motor Vehicle Board rule is a law and you make law when you establish rules of practice and procedure. If I can get this thing to work. Here we go.

So, typically what happens is, one of two things. That first box says that you get a request for a rule. By the way, these boxes are couched in terms of things that went on at the Motor Vehicle Division but they apply equally in the Vehicles, Titles and Registration Division and the other department divisions.

That's not the only way a rule gets started.

Many times, in fact, most of the time, in my experience, rules come from the staff. The staff says, You know, this would be a good idea to have a rule on this or this would be a good idea to change this rule. Sometimes it even comes from the Board who thinks that rules need to be modified or changed.

A request that comes in, you know, typically it'll have proposed language, somebody will say -- and, by the way, the people that can request a rule, under the statute, are interested people. I like to turn that around and say, people with an interest at stake, if you will.



The Rule request comes in and you are presented it by the staff, after we have researched it and ultimately, a draft of a rule is done and that third box is what it's really talking about. There's a term in the industry now called negotiated rulemaking. Well, I kind of think that that's been going on in an informal way for a long, long time. But typically what will happen is, somebody like Carol Kent will pick up the phone and call Ms. Phillips or the associations and ask them what they think about a draft and they'll start working on a draft of a rule or Mike Craig will do it with Betsy Price, with the Texas Tax Assessor-Collectors.

People in the industry, people of interest are consulted when the staff is working on rules, typically. Ultimately, a proposal is presented to you of a rule that we would like to publish. Once that happens, assuming that you approve it, once that happens, it gets published in the <a href="Texas Register">Texas Register</a> and it's out there for the world to see. It's also on the web. And there's a period for comment. Sometimes you even have hearings on rules and people make public testimony -- oral testimony but there's always a period for written comment on proposed rules.

Then, ultimately, the whole procedure comes back to you and you get to decide whether or not to adapt



the rule or change the rule. But, again, in this area, the thing that I would want to say to you, unlike your judge's hat, you are a legislator. Now, I don't know if that means that you ought to be taking African safaris from a lobbyist but it does mean that you do not have the ex parte concerns that you do in contested cases.

So you are more free to get information and discuss the topic of a rule with folks. And, my advice to you -- unlike what I said in a contested case, you should turn and run and seek counsel -- is, you should probably just seek counsel if you have a concern.

Opinions. The Motor Vehicle Board has a really strange little piece of statute. It's just a couple of words that talks about Declaratory Orders, I think. And, long ago, a rule was prepared -- a couple of rules were prepared, that are your rules now, that talk about the opinion process.

This is a way to get -- it's not a rule and it's not a contested case. It's a way to get a general statement of policy by the agency out there in the world. The informal opinion process comes from the staff. It is not -- and there's a rule that talks about how you do that. A staff opinion is not binding on the Board, in any way, shape or form. Period. It's just not. But it



is a way, because, as Mr. Walker would say, you know, we're paid to be here every day, so it is a way to get something done in a pretty timely manner if somebody just wants to know what the staff thinks something means.

A formal opinion process is really about interpretation of your statutes that you administer. Do you have any questions so far? Typically, what happens is, in the informal opinion process is, we get asked the question. The same thing happens in the formal opinion process, it's just addressed to the Chairman or Mr. Serna. And they'll ask -- they'll frame whatever the issue is and ask for the Board's formal opinion on the issue.

In your rules, there are some exceptions to when you would or wouldn't take a formal opinion request. If the matter is currently a docketed case that you're going to hear otherwise anyway, under your rules you wouldn't hear that one. You wouldn't hear a matter that would take significant research and investigation on the staff's part that hasn't already been fleshed out.

There are a couple of other ones; I don't have the rule in front of me but I can certainly get it for you but there are some reasons why you would not hear a formal opinion request.



When you do hear one and you make a decision, under the rule, that decision is not binding if new facts come to light. When you make a formal opinion based on what you've been presented and then, turns out what you were presented isn't the whole picture or something

changes or something develops, you are not bound by that.

As you can see, in the boxes, it's what I said; open cases are researched. That's one of the exceptions, to make sure there's no conflict. The subject matter is assigned to an attorney. It's researched and then the whole matter is packaged up and provided to you for your decision.

This is not rulemaking; it's not contested case matter. So, it's not really being a judge and it's not really being a legislator, it's -- I guess, being a Board member but if I had to put it on a sliding scale, I would put it closer to being a legislator, being a rulemaker than I would being a contested case. So I think you're a little freer to obtain information but I would exercise caution in terms of being worried about -- it's not a contested case in terms of ex parte communications but you might want to be cautious about how you obtain your information.

One thing I'd like to mention -- it's out of order a little bit, and this is the last slide -- and it



relates to the hearings, when you're a judge. This is difficult for me, in some ways -- just philosophically, but when the legislature determined that the State Office of Administrative Hearings was to hear cases, it placed some general restrictions on agencies on boards and commissions, on what they can do once the Proposal for Decision comes to them -- you.

And there's a risk in there of about three things; three ways -- three justifications you can have for changing a decision. In other words, if a Proposal for Decision comes to the Board and the ALJ says, I recommend "A," and the Board says, We want to do "B," you can only do "B" if you can make it fit one of these reasons, otherwise you are pretty much bound by what the ALJ found and concluded.

And the three ways are -- maybe I'm can read it -- I can't read the screen so well. The three ways are that the ALJ did not properly apply or interpret applicable law, agency rules or written policies, that a prior decision was relied on by the Administrative Law Judge and it was incorrect. That's kind of an interesting one. That means that the ALJ, in his PFD, recited one of the Board's prior cases and said, Well, based on this I think it should be "A." And the Board can say, Well, first of all, this was wrong, that case



was wrong and we think it should be B. That's another way you can do that.

And then the third way is if it's a technical error. I have been involved in doing technical errors when it's -- when the date was wrong on something and you can change a PFD for that reason. That's minor.

I just wanted to highlight that for you so that you are not surprised when a contested case comes before you and "A" is recommended and you don't like "A" and want to do "B," that you're aware that you may or may not be able to do "B," depending on the reasons. Questions?

I don't know, Mr. Chairman, if that is anywhere near --

MR. VANDERGRIFF: That's great. Anybody have any questions? All right. With that, we'll move to the Consent Agenda that's listed, starting on page 2, it carries all the way over to page 14. We can, on the advice of counsel, take all those up with one motion versus separate them out by section or individually. Do any of the members -- would you like their separate -- is there one particular case you'd like to take off the Consent Agenda?

MR. BUTLER: Motion.

MR. VANDERGRIFF: All right. Well, I will then take that as also that we don't need to take any cases off the Consent Agenda. I think we do have a motion to



approve the Consent Agenda in its entirety. Do we have a second?

MR. GILLMAN: Second.

MR. VANDERGRIFF: From Member Ramsay Gillman.

And with that, any discussions? Seeing none, I will ask for your vote, an affirmative vote for the motion by raising your right hand. Motion carries unanimously. We now move to Number 6 on our agenda, which is page 14 and we will consider a request for a formal opinion from the Board regarding Texas Occupations Code 2301.475(c).

Mr. Bray, do you want to introduce this one?

MR. BRAY: Yes, sir. Let me start out with the highest or the most general and that is, in the car world, in the new car sales world, some manufacturers provide some incentives for sales goals and I'm being kind of vague because there's all kinds of different ways. I've heard of dealers that got trips to Java for beating some sales goal or whatever but there's all kinds of ways that a manufacturer can incentivize somebody and for all kinds of reasons. Maybe there's a particular car that needs more attention than others. Maybe some are better sellers than others and they need to know how to move them. Whatever all that is, there's a whole system of incentives to -- for car sales. In 2000 and -- the last legislative session, I believe -- yes -- a section



was added to the Occupations Code that specifically states that incentives are to be paid to a dealer not to -- and not anyone else and that the dealer decides how the incentives get distributed. In other words, sales people are other personnel of the dealership are under the control of the dealer and, under the statute, it appears -- the wording is that the dealer is to decide how incentives are to be paid.

In the first part of 2010, an informal opinion was requested from the staff by the Texas Auto Dealers

Association about this statute. I believe the opinion is in your tab there, along with the request that was made by the Auto Dealers Association.

That's the informal opinion process we discussed a few minutes ago and now, a couple of months later, a formal opinion -- and the staff issued an informal opinion under my signature that says, the law is the law and it's pretty clear cut and -- of course, I'm summarizing but -- and the dealer is in control of how incentives are to be paid to his or her dealership.

The association -- the Auto Dealers Association has now presented a formal opinion request to the Board for you to decide the same thing and added a couple of more salient facts; who the dealer is that might be involved in this and what manufacturers and incentives



that we're talking about are the subject of this 1 2 particular formal opinion request. I believe that present today are Ms. Karen 3 Phillips on behalf of the Texas Auto Dealers Association 4 5 to present to you her formal opinion request and we invited and I believe we have a representative for Ford 6 Motor Company to respond and, with that, I'd turn it back 7 to the Chair. 8 9 MR. VANDERGRIFF: That's great. Okay. The 10 process that we're going to handle this by today and that the parties are notified was that each side would have a 11 maximum of 20 minutes in which to make their particular 12 13 presentation. You certainly don't have to use all that time, if you deem that necessary or you could --14 particularly in the case of the one asking for the rule, 15 to postpone some of that time for a response afterwards. 16 So, I think with that, Ms. Coffey, would you 17 18 like to make a presentation to us, please? 19 MS. PHILLIPS: Good morning. My name is Karen 20 Phillips and I'm with the --21 MR. VANDERGRIFF: I realized, when I said that, 22 immediately --23 24 MS. PHILLIPS: I'm fine. It's okay. 25 MR. VANDERGRIFF: I was looking over --



MS. PHILLIPS: I'm with the Texas Automobile

Dealers Association. It's an inside joke. And I

appreciate the time and I would appreciate the

reservation of some of this time back for rebuttal.

Today's request is very simple and very straightforward because the statute is very simple and very straightforward yet it's very important to the franchised dealers in Texas and that's why I'm here today.

Effective on September 1, 2009, eight months ago, a new provision went into effect and although the examples that were provided in the formal opinion request involved one manufacturer and one dealer, your ruling and your opinion today will be subject to and impact all manufacturers, as well as all franchised dealers.

Or, another way of putting it, is that your interpretation of the statute is something that all the franchised dealers will look to and all the manufacturers will look to, with respect to compliance in their own incentive programs. The legislature determined that if the manufacturer or distributor has an incentive program, the dealer is to be paid the money unless the dealer agrees to payment to another person.

There is no requirement placed on the manufacturer to even have an incentive program. The



state doesn't require that. That's at the manufacturer or distributor's option. If the factory determines that they're going to offer an incentive program, then the factory can determine the amount of the incentive, how long the incentive is going to last, how the payment's going to be made but the only caveat in the statute is that the program can not dictate to whom the payment is made. That's the dealer's decision.

A factory incentive program can't be structured whereby an element of the program is that the factory dictates who the person is to be paid. That's not and can not be an element of the program.

Ford makes in their letter to you, the argument that TADA isn't complaining about other after-market SPIFF programs to pay a salesman. That's correct. We are not complaining about the after-market programs that you might have or that an after-market company might offer with respect to bedliners or rust-proofing. The reason for that is because those companies are not subject to the statute. They are not under this Board's jurisdiction. The statute doesn't address them. They are not licensed by you.

And so, it would be outside the scope of the statute for TADA to even make such a request in the formal opinion.



Ford also states that it is studying making an IT revision and that it intends to implement the IT revision with an expected cost of \$110,000. Although IT systems are complex and I'm not going to suggest that I could go in Ford's IT system and fix it, it would appear to me that to pay approximately 250 dealers, which is about the number of Ford dealers we have in the state of Texas, versus over a thousand salesmen, on a per incentive program plus the 1099s that have to be issued would be much more expeditious, much less costly and much easier for the factory to do than to go in and pay thousands of salesmen; salesmen whose names change constantly, salesmen who may be here for one program and not here for the next program but yet the number of dealers remains constant.

And I would wonder why we couldn't just issue to Ford the names of the 250 dealers and not worry about the names of the salesmen. That way, we could get it done quickly. Ford wouldn't have to issue a 1099 and we could go on down the road.

The employer-employee relationship here is very special, as it is with all employers and employees. The employer takes responsibility for the workplace, for the safety of the employee, for compliance with federal and state rules, for payment of wages, taxes, benefits.



There's that symbiotic relationship that each depends upon the other. That relationship is one that the dealer takes very seriously and wants to make certain that they're the ones who have the control over their employees, not an outside force.

The dealer also notes firsthand what makes up his inventory. He knows if he's got too many trucks, too many cars, too many new vehicles, too many Mustangs, too many F-150s. He knows what his inventory is and he knows what his market is and he knows what needs to be moved.

Ford receives the money for the vehicle when they deliver the vehicle to the dealer. They have a captive customer. The dealer does not. It is impactful on the dealers to make certain that he moves his inventory and he has to be able to have the control over that, meaning that if an incentive program is there, he needs to be able to discern which pieces of his inventory need to be moved.

Texas law neither requires nor prohibits the manufacturer-distributor to offer a sales incentive program. Texas law doesn't say how long the incentive program must run. Texas law does not say which vehicles the manufacturer or distributor must incentivize. Texas law doesn't dictate how the incentive program is paid. It can be paid by credit card, it can be paid by



crediting the dealer's parts account. It can be paid by gift certificate. The state of Texas doesn't care. The only thing the state of Texas said this past session was the dealer is the one that decides who is paid.

Texas law is not something that is difficult to

Texas law is not something that is difficult to understand here. We think it's very straightforward.

There's a recognition that all incentive programs do benefit all parties. They benefit the public, they benefit the manufacturer, they benefit the salesman and they benefit the dealer.

We're not seeking any penalty or retribution here. We're simply asking for compliance and, on behalf of the franchised dealers, I would ask that the informal opinion that you have be adopted as the Board's formal opinion. I'm happy to answer any questions.

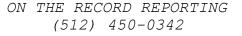
MR. VANDERGRIFF: Members, do you have any questions of Ms. Phillips? All right, thank you.

MS. PHILLIPS: Thank you.

MR. VANDERGRIFF: You're going to reserve -you have used up eight minutes so you have reserve -MS. PHILLIPS: Okay. Well, maybe I'll give you

a lot back.

MR. VANDERGRIFF: Okay. All right. Go ahead. Come on up.





MR. DONLEY: Good morning, Chairman

Vandergriff, members of the Board. My name is Billy

Donley. I'm a partner with the law firm of Baker and

Hostetler in Houston, Texas, and I represent Ford Motor

Company in this proceeding.

I did not attend your last Board meeting but I have reviewed the video and the transcript and I understand from the last proceeding -- your last meeting, that Director Bray and your counsel at the time, Linda Secord, advised that you ought not go forward and issue a formal opinion.

I want to state here, on the record, that Ford Motor Company would agree with that. My recollection of the statements made by Director Bray, sitting here in this chair, was that there is an investigation currently ongoing by the Enforcement Section of the Motor Vehicle Division and that's very concerning to me and my client that here we are being requested to put our position on the record when there is some investigation that I assume is still ongoing by the Enforcement Section of the Motor Vehicle Division.

By going forward and issuing a formal opinion, you have, in essence, issued what would be an advisory opinion that could impact any enforcement action that may



be brought against Ford Motor Company and, as a result of that, Ford Motor Company may be denied its due process.

And, as a result of that, I believe, based upon the Texas Administrative Code, the policies that Mr.

Bray -- Director Bray put on the overhead earlier or on the PowerPoint, it would not be appropriate for this Board to issue a formal opinion.

Let me state this, however. We are not concerned as to what the outcome of this formal opinion is going to be. We don't believe there's been any violation here. However, because there appears to be an investigation ongoing, we believe it would be inappropriate for you to issue a formal opinion.

I would also state and I recently issued a letter -- sent a letter to the members of the Board regarding Ford's IT fix. It is coming. They intend to do it the first quarter of next year. It is \$110,000 or so. It could be more. It could be less. I can tell you it is complex.

These are not just laptops that we're talking about that have to be changed in order to accomplish some type of fix for the issue that the TADA has brought forward to you. And, as a result, Ford would ask that you give us until the first quarter of next year to implement that fix. It seems at least based upon the



program at issue, that it would resolve, we believe, the issue that the TADA has brought to you.

And I know that the last time that you all met, you had decided to go forward with this and, as a result, I'm not waiving -- I want to be clear that Ford is not waiving its position regarding whether or not you should go forward and issue a formal opinion but I am prepared to go forward with the substantive position for Ford Motor Company on this issue and with that, if I may proceed, Mr. Chairman.

MR. VANDERGRIFF: Please.

MR. DONLEY: Thank you. I want to start with discussing these incentive programs because they are very important. They have been around for decades in the automobile industry, literally decades. Thousands and thousands and thousands of employees at these dealerships in Texas have benefited from these programs, to the tunes of millions of dollars.

Now, I'm not talking only Ford's programs here.

I'm talking, in general, for the industry. Thousands of employees who are out on the hot pavement in the middle of July, selling these products, have benefitted from these programs and it's been millions of dollars and I question why is it a problem for a manufacturer to provide incentives for these employees who are providing



their hard work and effort and sweat to sell these products. It seems to make absolute sense and, as Ms. Phillips stated when she was up here, other manufacturers of other products that are sold through dealerships can do exactly that. They can provide these incentives and on some of those products that are sold through these dealerships whether it be oil or filters or extended warranty plans, they can provide these types of incentives without any regulation.

And if manufacturers, Ford, in this instance, are not allowed to compete and provide those same incentives or incentives as they wish, the manufacturers of these automobiles are put at a significant disadvantage with their own products. The dealers have signed a Sales and Service Agreement to use their best efforts to sell.

To be clear, manufacturers and Ford, in this instance, are not trying to interfere in the operations of the dealership. Instead, they're simply trying to provide yet an additional incentive for the people who are on the front lines selling these programs, to use as much effort as they can to sell these products.

The papers that have been filed with you and that were filed with Director Bray for an informal opinion, I don't read anything in there that says that



there's any harm that has occurred because of these incentive programs. Indeed, I know of none. I can tell you sitting here, I've been working in this industry a long time. I do it across the country and I know of no harm that comes from these incentive programs and no harm is meant. It's meant to be an incentive.

There's only benefits and it benefits those people on the front line and certainly the program at issue here, the one that has been brought to you, that program is meant for the employees of the dealership, to be certain. It is meant to benefit them when they meet the parameters of that program.

To date, the program at issue has benefitted over a thousand dealership employees in Texas, over a thousand. That's a lot of folks out on the front line who needed a little extra money, I'm sure, when they sold those products. And it has been several millions of dollars that have been paid, indeed, under this program that is at issue.

Why do manufacturer's have these programs? Why does any manufacturer have these programs, whether it be automobiles or some other product? It creates additional brand loyalty. That's very important. You want the people out there selling your product to be loyal to that product. You want them to enjoy selling that product.



You want them to feel like they reap benefits from selling that product. After all, they're there to earn a paycheck. They're there to reap benefits and these incentive programs help in that regard.

It also creates additional interest in the program, especially if there's a slow moving product or something that can be pointed out using these incentive programs that, Hey, there are certain products that may not be moving as quickly. If you pay a little more attention there, maybe there's some additional incentives that can be paid.

But again, it directly benefits those that are on the front line, whether they be in the service bays or out on the hot concrete and, again, it can't be overstated. Manufacturers of other products in these dealerships can do exactly what the TADA seems to not want automobile manufacturers to be able to do. Why would we put automobile manufacturers at a disadvantage?

And, to be absolutely clear, with the program that we're discussing here today, that Ford Motor Company has, the dealer has control, the dealer makes the decision. When the program's submitted to the dealer, he gets to decide or she gets to decide whether or not their dealership will participate in the program. The dealer has complete control. They can decide, yes, I would like



for my dealership to participate in this program and the dollars can go to my employees, as set forth in the program. Or the dealer can say, No, I don't believe I want my dealership to participate in this program.

Either way, it's okay with Ford Motor Company. The dealership's decision will be honored.

If the dealership decides that it does not want its dealership to participate in the program, Ford Motor Company isn't going to force this money into the dealership. Ford Motor Company isn't going, under cover of darkness and without the dealer know it, pay the employees anyway. Instead, the dealership simply will not participate. It will not be a program available to that dealership's employees. And that's okay. That happens all the time with all kinds of programs and if the dealership doesn't want to participate, that's okay.

But the important part here is this. The decision point, in my mind in looking at what was submitted for the informal opinion and to you by the TADA, misses the point. The first decision point is not money being paid. The first decision point is, Do you want to participate in the program? Here are the parameters. We've set it up -- you know, the manufacturer says, We've set it up in a certain way and the manufacturer, Ford in this instance, would certainly



have a reason for doing that. After all, it's the manufacturer's money. To be absolutely clear with everyone here, it's not the dealership's money. It's not the employee's money. This is the manufacturer's money.

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They are literally pulling it out of their dollars; their pocket dollars to put into this program and they ask the dealer, Would you like to participate? Here's the parameters. Please take a moment. Read the Would you like for your dealership to program. participate?

And when the dealer decides, under that program, that I desire to participate and the program says the money will go to my employees, the dealer has made its decision as to where the money will go and whether or not the dealership will participate.

That should be absolutely okay. And to be clear, there's nothing in the state statute that prevents that. I've read the informal opinion. I've seen what's been presented to you.

Let me take a moment to discuss what the statute actually says. The statute does not say that a manufacturer has to present a program in a certain way or that it must have certain parameters. Instead, the statute simply says, money paid by a manufacturer, under

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the incentive program, may only be paid to the dealer unless the dealer decides the money may go to its employees. The manufacturer gets to decide how to set up its incentive program. It's absolutely okay. It's the manufacturer's money. They can decide whether to have one, whether not to have one, where they would like the money to go, what the parameters will be, but it is the dealer's decision -- and I want to absolutely clear, it's the dealer's decision as to whether or not the dealership participates in that program. And that's fine. And that's fine.

But when the dealer decides to participate, the dealer sometimes has made the decision as to where the money will go because the parameters of the program may say, This program is set up so that if you sell a blue vehicle on Tuesday, you get \$500, you get \$100, whatever it is -- it's usually not an awful lot of money for the sales people but it does mean something to them.

And the dealer can say, I understand that's the program. I understand that under the program the dollars would go to the employee. I desire to participate in that. And at that point, the dealership has made its decision that the money can go to the employee. If the dealer decides he doesn't want to participate, that's okay too.



But I think it's very important to understand that and when you look back -- when you look back at the informal opinion that was provided by Director Bray on January 22, in the second -- third full paragraph, he stated this, The statute section in question is straightforward. It speaks of money to be paid to the dealer. It doesn't speak of the program to be offered -- what has to be in the offer of the program. It's just if money is paid under the program -- if the dealer decides to participate.

So there's a -- in my mind, the statute answers the second question, not the first question. The first question is, Mister Dealer, Miss Dealer, do you want to participate in this program. In that respect, I agree with the informal opinion. It is the dealer's decision. The dealer gets to decide, though, whether or not he wants to participate in the program. That's the decision and that decision by the dealer is always honored by Ford Motor Company.

If I'm understanding correctly, the TADA wants a one size fits all approach. Here's a program and the manufacturer simply has to step back and dealers just get to do whatever they would like with the program. There's nothing in the Texas Occupation Code that goes to that



point. It's only money is paid, not the decision whether or not to participate in the program.

And, to be clear, there should never be -- it should not be that one dealer can decide how the money's going to go in a program that then would unravel an entire program because these incentive programs that we're talking about are dollars intended for employees. They're not intended to hit the bottom line of the dealership. There's other programs for the dealerships. They make their profit dollars in other ways. These programs that we're talking about here are specifically only intended for the employees.

With regard to the specific questions that has been asked of you for a formal opinion, I'd like to go through those, if I may.

The first question asked, If a manufacturer has an incentive program, may a manufacturer require its franchisees to sign a statement that requires 100 percent of the dealers or a percentage of the franchisees in the state of Texas to agree to authorize payments to dealership's employees in order for the manufacturer to continue such a program.

I think the question is better asked this way.

I would only take out a few words but I think the

question is really this: If a manufacturer has an



incentive program, may a manufacturer require 100 percent of its dealers to participate or the manufacturer decide not to have the program. And the answer is, yes, a manufacturer can decide that for a particular program, it needs, for whatever reason, 100 percent participation of its dealer body or it simply will not have the program.

I struggled with what's wrong with that.

Again, it's the manufacturer's money. They ought to be able to decide that in this one, it makes us no difference whether we get one participant or 100 percent, we're going to have the program. But, in a different program, they may decide, for this particular program, because of what is involved or the money that the manufacturer decided to invest in the program, or how much effort it takes for the manufacturer to actually operate the program, that they need 100 percent participation.

Again, there's nothing in the Motor Vehicle

Code that touches that issue. The manufacturer can roll

out the program as it wishes. It can place the

parameters on the program that it needs and then allow

the dealers to make their own individual choice. If it's

not 100 percent participation, it may mean sometimes that

the manufacturer does not go forward with the program.

They may make another decision. I don't know. The point



is that the manufacturer, under the Texas Occupation Code, certainly has the right to decide what level of participation it needs for a particular program.

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The second question is, If a manufacturer has an incentive program, may a dealer request payment of the incentive program money to be paid to the dealer, another person or to an employee. The answer is yes. He can do But, as I stated earlier, that decision is sometimes made when the program is offered.

If the program sets it up so that the dollars would flow to the employee and the dealer is asked, Would you like to participate in this program, when the dealer makes its decision that, yes, it would, or would not, like to participate in the program, then it's made its decision as to where the money would go, as well.

And so that decision is always there and available to the dealer. It isn't as if -- and certainly no one would argue here today that Ford Motor Company, with its program, is forcing dealers to do something with these dollars that they don't want to do. Instead, they get to decide if they want to participate in the program and that's the way it ought to be.

There is no reason ever to take that type of flexibility away from manufacturers. I would suggest to you, very sincerely, that if that type of flexibility is

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not allowed to manufacturers in Texas, these types of incentive programs that are only meant for these employees may very well go away. I'm not sure what reason manufacturers would have to have an employee incentive program if the dealer can decide to put those dollars in its pocket. The purpose of these programs are for the dollars to go the employees.

And then, the last question that is asked is this, Is each incentive program payment a dealer's individual decision? Again, I think the answer is yes. But again, you have to weigh that against the fact that the dealer makes that decision when he decides or she decides to participate in the program at issue. That's where the decision is actually made.

And, again, that's okay because I think it would be difficult, in my mind, for anyone to argue, we just don't want these programs in Texas. I think everyone would agree, we want these programs in Texas and the way to have them is for the formal opinion to state that the Motor Vehicle Code -- the Occupations Code does not place parameters around what manufacturers can do in the offer of its program and that the dealer does get to make its individual decision by deciding whether or not to participate in the program.



To wrap things up, again, I do not believe, on behalf on Ford Motor Company, that this Board should issue a formal opinion, for the reasons I've stated earlier. I think it's also important to remember and I did forget to state this earlier, that this request for an informal opinion and originally for the formal opinion, was it made on behalf of one dealer, Leif Johnson Ford?

I don't know what Leif Johnson Ford's intentions are. I don't know if they plan, after receiving whatever your decision may be, to file a contested case but I think it would certainly be inappropriate for Leif Johnson to be able to come in and get -- obtain from you a formal opinion, knowing that they intend to file a contested case proceeding.

However, if the Board decides to issue a formal opinion, I would ask that you answer the questions in the way that I just presented the answers to you, with the central issue being that -- pardon me -- that the decision made by the dealer as to where the money goes is made when the program is offered, whether or not the dealer wants to participate in the program.

And, in doing that, you have given the dealers what they would want. And that is, control of their dealership and how it's operated, without interference by



the manufacturer, if that's what they're after here today. They get to do that by deciding whether or not to participate in these programs and, specifically, the Ford program at issue here today. I can take any questions, if there are any.

MR. VANDERGRIFF: Do you have any questions?
Mr. Walker.

MR. WALKER: You've spent a lot of time this morning talking about dealer's programs -- I guess I need to turn this on. You spent a lot of your time and our time telling us that Ford has the right or the manufacturer has the right to the program but I don't think that that's really the issue here and that's not something that's in dispute today. I think that what is in dispute is to how the distribution of that money is to be handled and you read the law to us that states very plainly that the Texas Legislature, who makes the laws in the state of Texas, has made a determination that in -- and I guess really we should have -- somebody should have come with your company to the legislature and said, We don't want this to be passed but doesn't the law say that it may only be paid to the dealer?

MR. DONLEY: Unless the dealer --

 $$\operatorname{MR.}$$  WALKER: Unless the dealer decides to direct that money elsewhere.



MR. DONLEY: Correct. 1 MR. WALKER: So --2 3 MR. CAMPBELL: Let me just ask you a question. Is it saying -- it's saying it's paid to the dealer, 4 5 it's only to the dealer. Does it say in the statute, Unless directed some other way. Does it say that in the 6 7 statute? 8 MR. DONLEY: It says, Unless the dealer agrees to the payment of the money to another person, including 9 10 an employee of the dealership, before the payment is 11 made, which was the basis of our argument that the dealer makes that decision when they decide whether or not to 12 13 participate in the program. MR. VANDERGRIFF: If you will look to your --14 the second green tab in your book, on page 2, you can 15 find the actual language. It's actually pretty easy to 16 17 spot in the TADA request. 18 MR. CAMPBELL: It's on page 2. MR. VANDERGRIFF: But it's at the top of it, 19 20 the language itself. 21 MR. WALKER: Well, let me kind of expound on what you talked about here. I don't know why a Board 22 23 would want to issue -- I assume that Ford is issuing a 24 1099 on all the people they're making checks payable to. 25 Is that correct?



MR. DONLEY: I would assume they're following whatever laws they have to. I'm not familiar with that end of the process.

MR. WALKER: Well, any time they pay somebody money over \$1100 a year, you have to take a 1099 under the Federal tax code.

MR. DONLEY: And I would assume that's exactly what Ford's doing then.

MR. WALKER: So, Ford's got a situation where they've got to go out here and keep track of those people, make sure that they've got 1099s, make sure that all the files are kept on their records that they've paid money out to these people, so -- it's pretty cumbersome, I would think, to do that.

The other thing that I'm not sure that Ford regularly takes into consideration and I can appreciate the fact that you have programs but you alluded that the benefit only goes to the dealer. There's a huge benefit back to the manufacturers also. Those programs create a benefit to Ford, or Chrysler, or Mercedes, whoever it might be. They're selling products that they're making a profit on also. So, you didn't allude that there's a benefit back to the manufacturer also.

MR. DONLEY: And let me clear. I'm not suggesting there is not a benefit to the manufacturer.



They benefit every time someone sells their product.

Absolutely.

MR. WALKER: And what you don't realize maybe is that if you're -- and I don't know, a not a car dealer, is that maybe your program, if you're trying to promote -- let's talk about maybe parts, back there at the parts counter and it's Johnny Smith that's on the counter that you're writing that check to, the dealer may have some incentives -- and I don't run a dealership, again, but it's kind of like, when you go to a restaurant sometimes on tipping.

They have a tip pool where everybody puts that money into a jar and into the night that Janet, myself and Fred -- we all participate, we all reach out as a team together and we ought to share those individually amongst themselves and if, in your program, where the dealer doesn't have the ability to do that, then Janet gets all the money and I don't get any of it and we both worked as a team and now I have to rely upon Janet to distribute that money back to me, I think, and then, Janet, in turn, now, who doesn't have the ability, needs to go and do a 1099 back to me because I need to have the money reported so it seems like it gets pretty cumbersome back, if you don't have an ability for the dealer to manage that distribution of that money.



MR. DONLEY: But that's where the dealer -they believe that it's too difficult to manage in that
regard or they don't like the way that the program is set
up, they can decide not to participate. The dealership
just simply would not participate and that's actually
fine. That decision would be honored.

MR. WALKER: They have that right not to participate and they also have the right, I think, the way I interpret the ruling, is that if they don't want to take and make the distribution of the money to the individuals, they still have the latitude to do that through the law by going back to Ford or whoever and saying, that we would prefer that you handle the distribution of those funds, the way I interpret the law.

MR. DONLEY: If I understand you correctly, that would mean then that when a manufacturer has a program that participation by every dealer in the state is automatic; they're going to participate. Then the money flows ever how it flows and the dealer just gets to decide where it goes and that's where maybe we differ a little bit in that -- pardon me, the Occupations Code does not place those kind of parameters around manufacturers and how they structure their programs. And so, it leaves them that latitude with how they structure them and, if the dealer doesn't like the structure of the



program, doesn't desire to participate, again, that's fine and to me -- that, to me, is the important decision, the dealer getting to decide whether or not I want my dealership to participate in the program as opposed to it's just being forced that everybody's going to participate. Dealer, you just have to decide where the money goes.

MS. MARZETT: Mr. Donley, Janet Marzett. Just to ask a question. The only option the dealer has, it's an all or not. In other words, if a dealer elects to participate, the way you just described it to me, then they have to participate by allowing the funds to go directly to their employees. If they elect not to do that, then they cannot participate at all.

MR. DONLEY: Then they simply elected not to participate.

MS. MARZETT: Okay. That's a pretty black and white.

MR. CAMPBELL: If I could -- and I want to make sure I totally understand this because the way I interpret this statute here, it says that the money paid by a manufacturer-distributor under an incentive program should only be paid to the dealer. And then it says, unless the dealer agree to payment of the money to another person. And then it goes further to say, Upon or



before the payment. It doesn't say, Upon deciding to participate or not. What you're telling us, is based on the participation before it and this is saying, if there's an incentive program that they're in, they determine -- it doesn't say anything about deciding. I think that's with you.

You decide whether to put the program on or not. They decide whether to participate or not. But, if it -- based on the statute, the way I understand it, but if they participate, then they determine where it goes. Is that not what this says?

MR. DONLEY: I don't believe it does and, in fact, I would go back to the informal opinion where Director Bray said that the statute speaks of the money to be paid. It doesn't talk about the offer or the program itself. Because within the program itself, the dealer can decide, Do I want to participate with this being -- with the parameters telling me where this money is going to be paid. I see it as one step before.

MR. CAMPBELL: I think that's outside our parameters. You know, that's between the manufacturer and the dealer. I think what the statute's saying, in my opinion -- maybe Mr. Bray can clarify it to me -- but, in my opinion, what the statute's saying right here is, real specific, Incentive programs can only be paid to dealer



unless the dealer agrees to the payment -- other monies to another person, including any employee of the dealer before the payment is made. And so I guess I'm lost in between the part where you say they either choose or they don't choose is before this happens -- before the statute takes place.

MR. DONLEY: You actually see part of what I'm arguing very clearly. Because that's exactly right. I see the offer of the program as one step before money being paid but --

MR. CAMPBELL: But that's not --

MR. DONLEY: -- the statute picks up at the moment the dollar's at the dealership door and if the dealer has accepted the program and said, I'll abide by the parameters of the program, yes, I want to participate, and if the program says the desire is for these dollars to go the employee, the dealer, in deciding he wants to participate, has made his decision that he's agreed that the money can go to another person, in that case, an employee.

MR. CAMPBELL: But, that's not part of the formal decision that's being brought to us today, to my understanding. Maybe I'm just understanding. Am I on target here?

MR. WALKER: I think you're right on target.



MR. CAMPBELL: And if our formal decision that we need to make is based on the statute, whether you agree to do this or don't agree to do this is between you and the dealer, you as a manufacturer and the dealer. Is that correct?

MR. DONLEY: If I'm following you, I agree with you.

MR. CAMPBELL: Okay.

MR. VANDERGRIFF: Any additional questions?

MR. RODRIGUEZ: And then following that is, the only time this would apply is where there is no agreement.

MR. DONLEY: The time this would apply is that if the dealer decided to participate and they've made their decision, based on the program as to how the money would flow. But let me also say this, there could be programs where it's -- there's X dollars and if you just simply want to participate and the dealer gets to decide, there can be all types of incentive programs. We shouldn't be lost on that. The dollars may be put out there where it's more general, the dollars may be put out there where they -- this program says these dollars will actually go to the dealer. Dealership, do you want to participate? Yes. This program says these dollars will

go the employees. Do you want to participate? So, there 1 2 can be all types of incentive programs. MR. RODRIGUEZ: Okay. Just to kind of simplify 3 this, at least from my point, if you put out a program 4 5 today --MR. DONLEY: Yes. 6 7 MR. RODRIGUEZ: -- offer a program to dealers in Texas. And you say, you know, this is a program. 8 9 This is the amount of money we will pay. If you want 10 to -- dealer, if you want to participate in this, you 11 must agree that this payment will made to the employee or whomever you say. Will that solve this problem? 12 MR. DONLEY: That would be -- that could be a 13 14 parameter under a program where a dealer would have to make that decision. 15 16 MR. RODRIGUEZ: The dealer says "Yes." 17 solves this problem on its face. Right? MR. DONLEY: The dealer's made its election. 18 I'd agree to that. 19 20 MR. RODRIGUEZ: If the dealer does not agree and you go forward with the incentive program, then this 21 22 chapter, the law triggers. Is that correct? 23 MR. DONLEY: I would say if the dealer does not



agree with the parameters of the program, that would mean

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the dealership is not participating in that particular program.

MR. RODRIGUEZ: And my question was, if the dealer says, I don't want to agree to those terms but you implement the incentive program nonetheless, then this applies.

MR. DONLEY: I don't believe that the

Occupation Code makes it a one size fit all approach. In

other words, if there is an incentive program, it's

simply out there for all dealers to decide what they want

to do with it. I think the Occupation Code allow the

manufacturer -- and for good reason, they need that

flexibility, it's their money -- to separate the

parameters of the program and ask the dealer, Do you want

to participate?

MR. RODRIGUEZ: Right. But let me --

MR. DONLEY: But a dealer can't go around that and say, Well, I don't want to participate under those terms but I still want you to give me the money.

MR. RODRIGUEZ: Okay. My question was not that. My question was this. If you have an incentive program that outlines the guidelines. You know, this --we'll pay X amount of dollars. If you implement this program you must agree that this money will go to x, y or z, whomever you determine; that's your program. Correct?



1	MR. DONLEY: Yes.
2	MR. RODRIGUEZ: The dealer agrees to
3	participate.
4	MR. DONLEY: Yes.
5	MR. RODRIGUEZ: There is no issue.
6	MR. DONLEY: I agree.
7	MR. RODRIGUEZ: Okay?
8	MR. DONLEY: I agree. I agree with you.
9	MR. RODRIGUEZ: Because if you have dealer
10	agreement.
11	MR. DONLEY: Absolutely.
12	MR. RODRIGUEZ: So there's no issue with this.
13	MR. DONLEY: Correct.
14	MR. RODRIGUEZ: If a dealer says, I don't like
15	the parameters you want to implement and you implement
16	the program nonetheless, then this triggers it?
17	MR. DONLEY: I'm not sure I understand what you
18	mean when you say it triggers at that point.
19	MR. RODRIGUEZ: What I'm saying to you is, if
20	your program is an incentive program where you are
21	putting this out and you're saying, This is our program.
22	We'll pay X amount of dollars to $x$ , $y$ or $z$ person. Mr.
23	Dealer, tell us if you agree with this. The dealer
24	agrees with you. You're in business. No problem.
25	MR. DONLEY: No problem. Correct. Yes.



MR. RODRIGUEZ: If the dealer does not want to 1 2 agree with you and you implement the program anyway, then you must pay that money according to the statute to --3 MR. CAMPBELL: Chief, if I could, because I 4 think there is a breakdown there --5 6 MR. RODRIGUEZ: Okay. MR. CAMPBELL: -- because if the dealer 7 decides not to participate, then this does not apply. 8 9 MR. RODRIGUEZ: Well, I mean --10 MR. DONLEY: Right. 11 MR. RODRIGUEZ: And I understand 100 percent. MR. DONLEY: And that's exactly my position. 12 13 MR. CAMPBELL: But if they do decide to 14 participate, then it's got to be done as the statute, is the way I interpret this, which is, you pay the dealer 15 and the dealer distributes the money. And that way --16 MR. RODRIGUEZ: And that's not my question. 17 18 That's not my question. If your program is such that -let me just kind of -- you're putting out a program that 19 20 says, We will pay X amount of dollars to x, y and z persons of our pre-prescribed, you know, seller, buyer, 21 22 however, you want to do that. That's your program and 23 Mr. Dealer, if you want part of this, you must agree to 24 this. Right?

MR. DONLEY: Right.

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MR. RODRIGUEZ: And they agree to that. 1 2 there is no problem. MR. DONLEY: And there is no problem. 3 that we've -- that any statutory obligations that would 4 5 be impacted have been met. MR. RODRIGUEZ: Regardless of formal opinion or 6 7 no opinion, there is no problem. MR. DONLEY: I believe there would be no 8 9 problem, based on the Occupations Code. 10 MR. RODRIGUEZ: And, irrespective of whether or 11 not you had 100 percent participation and all the other stuff that you mentioned. 12 13 MR. DONLEY: Depending on the parameters of 14 that particular program, assuming there's no particular percentage needed for the program to be in existence. 15 MR. RODRIGUEZ: Irrespective of that --16 MR. DONLEY: Yes. 17 18 MR. RODRIGUEZ: -- if the same program were offered, the one we just described a minute ago and the 19 dealer does not want to participate. 20 21 MR. DONLEY: Yes. 22 MR. RODRIGUEZ: Okay? And you went forward 23 anyway and at that point in time, you'd be obliged by 24 what the law dictates and says, You must give that money to the dealer. 25



1	MR. DONLEY: I'm still struggling a little bit
2	because if this particular dealer said he did not want to
3	participate, it would not be implemented for that dealer.
4	MR. RODRIGUEZ: Okay.
5	MR. DONLEY: He's made his decision.
6	MR. RODRIGUEZ: Okay. I'm just saying, if he
7	says he doesn't want to participate but the program
8	you implement the program anyway I said, if you
9	implement the program anyway.
10	MR. DONLEY: As to other dealers. Because it
11	wouldn't be implemented we wouldn't implement it with
12	a dealer who said he didn't want to participate because
13	we would honor that decision.
14	MR. RODRIGUEZ: And I understand that. I'm
15	just saying, supposing that you implemented it anyway.
16	that's what I'm asking you, with that dealer.
17	MR. DONLEY: At least as to this Ford program,
18	I can tell you that would not be done. I can't answer as
19	to
20	MR. RODRIGUEZ: That's not my question.
21	MR. DONLEY: it would not be implemented to
22	a dealer
23	(Simultaneous discussion.)
24	MR. RODRIGUEZ: That's not what I'm asking.
25	I'm not asking that. I'm asking you
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MR. DONLEY: Then I'm misunderstanding. I'm 1 2 sorry. MR. RODRIGUEZ: Okay. All I'm asking you is 3 If you have a program and you're offering X amount 4 this. 5 of dollars to whomever you've pre-prescribed in your program and dealer agrees, you are in business and you 6 7 implement, there is no problem with this. 8 MR. DONLEY: I believe there's no problem 9 there. Correct. 10 MR. RODRIGUEZ: If the dealer does not agree 11 and you implement the program anyway, even with a dealer who's not in agreement with you, then you would be 12 13 obliged -- and I'm not asking you whether you would implement with them or not, my question is, if you did 14 anyway, and this would be a trigger. 15 MR. CAMPBELL: I've got the answer to it. 16 they distribute money to the dealer and they didn't agree 17 18 to be in the program then it's got to be done this way. Is that correct? 19 MR. DONLEY: I would think that's correct. 20 Τf 21 the dealer did not want to participate and the manufacturer tries to shove those dollars through the 22 23 dealership anyway, that's a whole different ball game. 24 And, just to be clear, nothing that I report here today,



on behalf of Ford Motor Company, says Ford Motor

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Company's going to force it through that dealership.

Instead, as I've stated earlier, when the dealer makes his decision whether or not to participate, I can tell you on behalf of Ford Motor Company, that decision's going to be honored. We're not going to say, Well, Mr. Dealer, we hear you but we still want to give these dollars to your employees. That is not going to occur with the programs at Ford Motor Company.

MR. VANDERGRIFF: Can I ask a question?

MR. CAMPBELL: If you still -- you have any answer to your question? I don't think you have.

MR. RUSH: I'm making it real simple. If the dealer signs up for your program, he gets paid. If he doesn't sign up for your program, he gets nothing.

MR. DONLEY: Correct.

MR. DONLEY: Please.

MR. RUSH: So that means he's at a disadvantage in selling the vehicle if the other vehicle people get \$500 a car, or whatever it is.

MR. DONLEY: Well, I don't know that it'd be appropriate to say a disadvantage for this reason. The dealer has made his decision as to how he wants or she wants to operate the dealership and if they want to participate in the program and obtain that money, fine, and if they don't, fine.



Another example might be as a certified used car program. If a dealer wants to participate in a certified used car program, great. If they don't, that's fine too. It's their decision they make as to how they wish to operate --

MR. RUSH: My point was taken. Thank you very much.

MR. VANDERGRIFF: Can I -- at the risk of perhaps not interpreting Member Rodriguez' question about it -- I think I do, I think I understand it, is that you offer a program and you'd like to offer it a certain way, which is to pay it to the employees but you offer a program and you implement that program in the state. Why is it not a reasonable interpretation then, once the program is implemented, and you've implemented one. At that point, why is it not a reasonable interpretation to read the statute as it's written, which is, Money paid by a manufacturer-distributor, under an incentive program, may be paid only to the dealer, unless the dealer agrees to the payment of money to another person.

The incentive program is active, it's in the market, I don't see, in this language, where it says that you can make a black and white case, Well, if they don't sign a waiver form then we -- I don't -- enlighten me, help me with that.



MR. DONLEY: Well, to be clear, I'm not sure that, one, I would call it a waiver form but if the parameters of the program are, it's the sale of this product or this length of time, it's X number of dollars and the dollars would flow to the employee, through the dealer, would be fine. The dollars flow through the dealer to the employee. Your agreement's with the dealer; that's ultimately where the dollars will reside. Do you wish to sign on this form that you agree you'll participate in the program?

MR. VANDERGRIFF: But -- I hate to interpret but I want to say that this doesn't say, the way the statute's written, that it's a choice on an either/or basis. I mean, your choice -- Ford's -- excuse me, choice to offer the program is clear. You do it or you don't.

MR. DONLEY: Right.

MR. VANDERGRIFF: And once you do, then this language would seem to apply versus a checkbox that we can pay it. It seems like it's getting around the very thing that the statute was designed to address and then, a follow-up question I will ask you. Are you aware that this language was part of a larger bill that was introduced in the legislature and it was an agreed bill by manufacturer representatives, including Ford Motor



Division, coupled with the automobile dealers? Are you aware of that? That this was an agreed bill.

MR. DONLEY: I'm not aware that it was agreed bill but I'm not also not aware as to what the various interpretations might have been by the parties that were there.

MR. VANDERGRIFF: So, you don't know that, for example, in that agreed bill, there were provisions made that were in effect beneficial to the manufacturer positions they sought that gave them some relief on other issues? Just --

MR. DONLEY: I would assume that very well may be true. There are certainly provisions in the Motor Vehicle Code where the manufacturers do get some relief, as well as dealers. So, I don't doubt that one bit but I think maybe the disconnect from the questions I'm getting and the position I'm taking is this, is that, if I'm understanding Mr. Chairman correctly, it's that, despite the fact that a program has been offered to dealers and they've decided to participate or not to participate, if the manufacturer then comes out and offers the program, the dealer's prior decision to participate or not to participate is irrelevant. The program's out there, so they now they just simply get to decide where the dollars go and my position is that the dealers get to decide



whether or not they want to participate in the program.

They get to control their dealership --

MR. VANDERGRIFF: But this language doesn't talk about it being an individual dealer choice. This language of this statute talks about money paid by a manufacturer or distributor, under an incentive program, may only be paid to dealer unless the dealer agrees to pay it otherwise. So, it's like -- for example, however many dealers there are in the state of Texas -- I think I heard the number 250 -- approximately -- Ford dealers. If, of that number, if 249 or 240 of them agreed to be paid to their employees, so be it. But if one or two or ten don't, then how does this not apply?

You've put in an incentive program. You've asked your dealers to let you pay it directly. Some of have agreed -- the majority have agreed but some have not. How does that not apply? How does it become -- how does this statute not work as it's written?

MR. DONLEY: And I agree with some of the statements made. The dealers get to make their individual decision and the individual decision is whether or not to participate in the program.

MR. VANDERGRIFF: That's not what the statute is addressing. It just says there's an incentive program and this is how the money is to be paid. It doesn't say



at the beginning of it, that there's this option choice here that applies.

MR. DONLEY: And that's part of my position is that the statute does not reach back to the offer of the program itself. It just doesn't go there. It goes to the money to be paid. Once the dollars hit the door, then it's a different issue. But the actual offer of the program itself of the manufacture's money, under an incentive program, that's one step removed from this statute.

(Simultaneous discussion.)

MR. VANDERGRIFF: Again, I'm having a hard time understanding is that you've agreed to -- you've decided that your choice, at Ford Motor Company's choice, to offer an incentive program. You've offered an incentive program. Now you're coming to the dealers and saying, We'd like to pay this money as a SPIFF to your salesmen. We'd like to do that and the dealer then elects to do that and that's exactly what the language of the statute -- but then there are a few dealers, apparently, who don't want to do that and so, why does this statute not apply, as it's written, to what you're saying. You're trying to put the choice before where actually it's been addressed in the statute. I'm not sure I understand how you get there.



MR. DONLEY: And, I respectfully disagree with that. To me the choice is, for the dealer to look at the parameters of the program and decide whether or not they want to participate. If the program says, you know -
(Simultaneous discussion.)

MR. VANDERGRIFF: I want to make sure I'm really clear. This choice -- you've offered the program -- Ford has offered the program and so then there's money to be paid out. The choice is, do I want to be paid to the dealer, as it says, May only be paid that way or do I want to waive that and have it paid to the employees. You're using the choice of payment as the choice of whether to use or have an incentive program in the first place. You're moving that choice at a different place in the process, which doesn't seem to be the way the statute addresses it so I'm just really trying to understand that.

MR. DONLEY: And my position is, the statute doesn't address the choice of that process when it's set forth in the primary parameters of the program. Instead, the dealer gets its choice to decide whether or not to participate in the program.

MR. VANDERGRIFF: Can you see the decision point being at a different place. The decision point -- at least for some programs, is whether or not you want to



participate -- and let me say this, I would think it would be unfortunate if there's a program, it's rolled out, let's say 60 percent of the dealers want to do it one way, 40 percent want to do it another and the manufacturer says, Well, gee, that's really not what I intended so we're going to withdraw the program.

MR. DONLEY: But that's not -(Simultaneous discussion.)

MR. VANDERGRIFF: -- and that wasn't the way at least I interpreted the intent of the parties were when they discussed this legislation back a year ago.

But, anyway, I think Member Marzett had a question.

MS. MARZETT: I just had a question. I mean, at the end of the day, the objective is for Ford and the dealers to be profitable so the parameters of your program say may it to sell 20 pink Cadillacs. Isn't it immaterial whether it's the dealer or -- pardon -- okay. Is that immaterial because the objective of what you're trying to do is move the vehicle. Or, you know, you've got some incentive on something. Is that the most important thing, the fact that it's payable to the dealer or to the sales person? Because to me, the way I'm interpreting this program, the dealer -- the only way they can participate in selling these cars, if they

followed some additional guidelines that you've implemented to only be paid to the employee.

MR. DONLEY: Correct, if they wish to participate but let me hit the key word I believe you stated and that is "material."

MS. MARZETT: Uh-huh.

MR. DONLEY: I think from any manufacturer's perspective, it is material that these dollars and again, it's not a lot of money. I think it is to some of us. It would be to me. It certainly would be to the folks out on the pavement trying to sell these cars. But it is material that these dollars go to incentify that salesman to get to work even harder to try to sell this particular product.

The dealer has control of the entire dealership and how the money flows and what they can do to make profit. The individual out there that we're talking about, here in these incentive programs, only get a paycheck. That's all they get. They don't have a profit center. They don't have nothing else they can rely upon so it is material for these incentive programs and it has been for the decades that they've been around in this industry that these dollars go to the employees as opposed to the bottom line of the dealership.



And, historically, that's the way these programs have operated. Indeed, when Maryland looked at it and it's part of what I provided to you, Maryland looked at this and I believe it's what led to the statute here in Texas is what Maryland did. Maryland decided, manufacturers, you can do that but only up to \$200. \$200, you're done.

Maryland then went into an emergency session and decided, not only are we going to repeal that law, your dollars can go to the employee directly or you can pay it to the dealer and the dealership must pay the employee directly.

Maryland saw what these programs were absolutely designed to do, what the material result was intended to be for them, repealed this law in emergency session, allowed manufacturers to either make the decision it will pay the employee directly or give the money to the dealer and the dealer has to make that payment directly.

MS. MARZETT: We can probably argue all day long what's the best way to offer the incentive and I think really just getting back what I'm reading is the statute. It's how it is interpreted that it can be ignored that the funds may be paid only to the dealer unless the dealer decides to distribute it to the



employee. How that very -- may be only paid to the dealer. I'm just trying to get -- I can't understand how that point -- that law -- that, to me, that law is ignored.

MR. DONLEY: And, to be clear, I don't -- from my perspective and I want to make sure I'm clear. I'm very sincere in my position. I don't believe my position ignores any part of this statute. Instead, I'm simply suggesting that the dealer gets to make that decision by deciding whether to participate in the program. What we often hear on the manufacturer's side is that, you know, dealers want to control their dealership, they want to be in charge, it's their dealership, it's their facility.

Okay, we understand. As I'm discussing this, the program is offered to the dealer and he simply gets to decide or she gets to decide whether or not to participate in the program.

I believe that's completely consistent with the statute. The dealer decides the money may go somewhere else other than the dealership's bottom line by deciding whether to participate in a particular program. Other programs may be more generic and it's simply up to the dealer. You do with these dollars as you wish. That's the parameters of the program. But other programs may be



set up where the dollars would actually go to the employee if the dealer cares to participate.

And to me, that's an important point. The dealer gets to decide how to treat the programs. Do they want to participate.

MR. WALKER: Mr. Donley, Johnny Walker. Can you tell me -- I have two questions for you. Number one is, why does Ford want to pay the employee versus the dealer.

MR. DONLEY: Historically, that's the way these programs have been set up. It is to incentivize the individual out there on the front line who's selling these products to make even extra effort to sell a certain product or whatever may be the goal of that particular program, as opposed to simply seeing the dollars go to the bottom line of the dealership.

And that's the same thing that extended warranty service plan programs are set up that you may not and I don't believe you have jurisdiction over it, that's what they do. They want to hit the folks that are on the front line trying to sell their product.

MR. WALKER: And let me follow that up with my next question, is that I'm sure that Ford Motor Company has a dealer franchise agreement with that dealer, between Ford and the dealer and, in that agreement -- I



sign a lot of contracts in my company -- and I've never seen a contract where it doesn't say that my employees were, at all times, in my relationship is that as an independent contractor and that Ford or the people I'm dealing with, whether it's Exxon or Chevron or BP, whoever it might be, that they exert no control over my employees because they don't want to take -- they want to maintain that relationship as an independent contractor and what Ford, it appears to me, is trying to do here is to exert control over the dealer and the dealer's employees and I think there are some contractual issues that you'd have to go back to your original contract, your master service agreements that you have between your dealers and there's an issue between contractor versus employee and, if you look at the laws, it's the first thing that states under the way the IRS looks at whether somebody's an independent contractor or whether or not they are an employee, is that who has control and Ford's trying to flex an issue control, in my mind, towards the dealer and toward that employee to exert control over how that money is being issued there.

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MR. DONLEY: I would disagree with that position in that Ford is offering its dealers the opportunity to participate in the program and by providing that offer to the dealer and giving the dealer



the ultimate say on whether or not its dealership participates in the program, Ford is not exerting any control over the dealership or its employees, in any respect.

It's giving the dealer the opportunity to make that decision and that's why the programs are offered and they get to make the decision whether or not to participate.

MS. JOHNSON: But sir, you are not making -giving the individual dealers that option in the letter
that was sent out by Ford in August of 2009, either 100
percent of the Houston region agrees or we're not going
to offer this incentive program. I have an issue with
that.

But, besides that, what I just said, we've always paid it to the employees. Suddenly, we have an IT issue. It's going to cost us a lot of money. I need to understand why changing the name of the payee is a \$100,000 cost for you, sir.

MR. DONLEY: Let me be clear. What I don't understand are all the IT issues involved but I can tell you that Ford Motor Company has checked with its IT department and has been told that it's going to cost at least \$110,000 to effectuate whatever fix is necessary to



software to change the ways that things currently operate.

(Simultaneous discussion.)

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MS. JOHNSON: Let's think about this. I have 50 employees. Okay. And, at any point in time, any day, the names of those employees can change. So, please tell me how it's more difficult for Ford to try all that and keep up with those different employees, how is that more difficult? You're adding names every day because a new salesman comes in or a salesman leaves so if you can -our payee -- because it's a new salesman, why can't you just change the name of the payee? I mean, it's not logical. Your initial argument is not logical and when the IT department at Ford could not figure out how to add a name -- which they're adding names every day. they said, Okay, Houston region, either all agree or you aren't getting anything in Houston and that today absolutely creates an unfair competitive market. with that said, I'd like to move that the code is clear and that the Board adopt the informal opinion of staff. I would also add to that motion that we direct staff to allow Ford time to adapt its program to comply with the new code.

MS. MARZETT: I second it.



1	MR. VANDERGRIFF: We have a motion and a
2	second. We kind of unusually the applicant for
3	excuse me, the Ford Motor Company's representative, Mr.
4	Donley, if we are through asking him questions. Yes, I
5	have not formally excused him from the process so are you
6	through asking him questions at this point?
7	All right. Thank you, Mr. Donley.
8	MR. DONLEY: Thank you for your time.
9	MR. VANDERGRIFF: I'm supposing from the
10	Board's action and the quick seconding of that, that
11	we're not wishing to perhaps hear Ms. Phillips. If she
12	would like to come back up and use some of her time but
13	I'd ask you if you would waive that. All right.
14	So, we have a motion and a second. Now, open
15	for discussion.
16	MR. GILLMAN: Thank you. In your closing, you
17	said give them time to do what?
18	MS. JOHNSON: To adopt its program to comply
19	with the new code.
20	MR. GILLMAN: How much time?
21	(Simultaneous discussion.)
22	MS. MARZETT: First quarter, 2011. That's what
23	he
24	MR. GILLMAN: I hear your proposal to say,
25	Let's do it the way we feel the statute's written.



MS. JOHNSON: Right.

MR. GILLMAN: I agree with them on that. But I don't understand the time you want to give them. I know, are you going to let them do the program anyway?

MS. JOHNSON: I don't understand their need for the time but in order to keep incentive programs in Texas and in the Houston region for Ford, if they absolutely can't figure this out then let's give them time to comply so that the Enforcement Division -- they wouldn't find them in violation.

MR. GILLMAN: What happens to those dealers -if the law's the way it's written, those dealers that do
not receive any incentive money at all, because you're
given time and those dealers don't -- the way it's
written around, if you don't make it effective today.

MS. JOHNSON: I obviously do not understand their inability to add a payee but what I do understand is we have an Enforcement Division that's going to hold people's feet to the fire and if complaints are fired, in order to make sure that the Enforcement staff fully understands in this instance, we're going to give them time to adjust the program. I'm trying to --

(Simultaneous discussion.)

MR. GILLMAN: I agree with your motion but I don't agree with this time factor.



MR. BUTLER: I don't either. 1 MR. VANDERGRIFF: Mr. Rodriguez has the floor. 2 3 Go ahead, Mr. Rodriguez. We still have some time. Rodriguez has the floor. 4 MR. RODRIGUEZ: I have a question and comment 5 and I'd like to make a motion after that. Mr. Bray, the 6 statute suggests that the payment must be made to the 7 dealer, right, unless the dealer agrees --8 9 MR. BRAY: Yes. 10 MR. RODRIGUEZ: -- to payment to an employee 11 or otherwise. Is that correct? MR. BRAY: Yes. 12 13 MR. RODRIGUEZ: Okay. My question is this. When is that dealer -- and we throw that cold water here 14 on the proposition that Ford can come in and say, This is 15 16 my incentive program. We want to pay X amount of 17 dollars, dealer, we want to pay it to X person. Dealer, 18 you must agree to this before we get to do this. If the statute says that the money must be paid 19 20 to the dealer unless he agrees, my question is, when is he supposed to agree to make payment to him or otherwise? 21 22 MR. BRAY: I hope you'll give me a full moment 23 to answer this because it's going to be complicated. 24 First of all, I told you so. I told you that you 25 didn't -- this maybe wasn't the best way to handle this



because I see that this is going to be a contested case before it's over with.

So, I just want to say I told you so but, having said that, I don't think the statute -- I think -- I was listening to all of the dialogue and I think what Mr. Donley would say is, there's an absence in the statute of the requirement that they include every dealer in each incentive program so their check box is earlier and that only those dealers that elected to be in the program can determine how the money is paid.

However, I can tell you, I think without any fear of contradiction from the MV staff, that there are other provisions that would come into play. And, by the way, I don't remember saying to you at the prior Board meeting that this was under investigation. If I did, I misspoke. I believe I said it was subject to investigation and it still is and now more so -- from that today more so than before.

There's a provision in the code -- I heard the dialogue about control. I can't recall who took it there but, yes, sir, there was a lot of discussion of control of the dealership. Well, there's an entire Code provision that says manufacturers and distributors can't control, directly or even indirectly, a dealership.

MR. VANDERGRIFF: Can or can't?



MR. BRAY: Cannot. Excuse me. And that's part of the statute that you're looking at now and so that's how complicated it's going to get because that's a subsequent question and that will be a debate because Mr. Donley will say, it's not control to offer them this out because Mr. Donley started off this whole conversation, if you'll remember, by saying, it's not much money, it's not the dealer's money, it's Ford's money and it's not very much money and he's never, in his whole career ever seen any harm come from it.

The dealers, the dealer community, I can assure you, is going to say, there is definitely harm if some dealers are in the program even if there's pay to their employees and some dealers are not and that's going to be another debate in another case.

So that's why it's very difficult to answer your question because the words in this statute don't touch on the issue that he's trying to bring before you.

MR. RODRIGUEZ: Right. I sort of had a question. That was my question then. Obviously we don't have an answer for that. My comment was I have a difficult time with suggesting that we allow time. I don't know if it's within our authority to do so to let somebody not comply with the law, if that's what the law



1	is. Therefore I move that we table this items, Mr.
2	Chairman.
3	MR. VANDERGRIFF: So we have a motion before
4	you to table the item entirely. Is that correct my
5	understanding?
6	MR. RODRIGUEZ: Yes, sir.
7	MR. VANDERGRIFF: Okay. All right. Mr.
8	Rodriguez' motion is to table this entire agenda item as
9	not ripe or appropriate for us to consider and that
10	motion takes precedent on the floor to be considered
11	first, so discussion?
12	MS. MARZETT: I just have a question?
13	MR. VANDERGRIFF: We actually need a second of
14	it. Is there a second?
15	MS. MARZETT: Is there a question before we
16	second or no?
17	MR. WALKER: There's not a second on his
18	motion.
19	MR. VANDERGRIFF: Go ahead. Question. There's
20	not a second on his motion at the moment. I know it,
21	currently.
22	MS. MARZETT: I just need to ask the question.
23	MR. VANDERGRIFF: Sure.
24	MS. MARZETT: So if we do delay in making a
25	decision on this, in the absence of not making one, what



is the business model now? Do they continue to only offer it if the dealer agrees to pay it to the employee? I guess Mr. Donley or someone.

MR. VANDERGRIFF: I think the status quo continues, which is, they are paying the incentive program where they check into the -- I don't know how many dealers there were -- but at least one that decided not to accept the payment in that process from them so I would assume the program continues. I guess the program's not at risk. Mr. Donley's shaking his head "Yes." If he wants to address that or if you want him to address it. I think he's addressed it.

MS. MARZETT: Is that correct?

MR. VANDERGRIFF: Sure, please.

MR. DONLEY: You're asking if the status quo continues?

MS. MARZETT: What is the status quo right now?

MR. VANDERGRIFF: If we table this item.

MR. DONLEY: I think I can nip that one directly. The program is continuing, as I understand it, right now but Ford is working on the IT fix and its intention is to continue to do that so the status quo would be, the program is where it is right now, as I would understand it. Frankly, I would need to discuss that with my client if we're going to end it this way but



I can tell you this and what I think is most important is
that I understand from Ford, with the discussions I've
already had with my client, that the IT fix will
continue, if you table this.

The idea is by the first quarter of next year
to have an IT fix. So I don't want -- if there's some

to have an IT fix. So I don't want -- if there's some misunderstanding that if you table this, Ford will not continue with the IT fix, my understanding is that that's exactly what Ford's intention is, just to have that IT fix, one way or the other.

MR. GILLMAN: Can I ask a question?

MR. VANDERGRIFF: Please.

MR. GILLMAN: So, you're saying you want to comply -- your client wants to comply.

 $$\operatorname{MR.}$  DONLEY: We certainly want time to have that IT fix. Yes, sir.

MR. GILLMAN: Which means you want to comply?

MR. DONLEY: We always be in compliance with the Occupations Code. Absolutely.

MR. GILLMAN: Okay.

MR. DONLEY: Absolutely. I want to be clear here today, since that question has been asked, there's never -- I've represented Ford Motor Company before this Division since 1997, I think on a continuous basis with every case they've had in Texas and I can tell you that



it is always my client's intention to comply with the 1 Occupations Code. 2 Now, there may be genuine disputes as to what 3 provisions mean but it is their position to always be in 4 5 compliance with this Code. MR. GILLMAN: Okay. 6 MR. WALKER: Since we do not have a second on 7 the Chief's motion. 8 9 MR. VANDERGRIFF: I haven't asked for one. 10 There may be somebody that's willing to second it but I 11 allowed the questions to be asked first. Is there a second? Unless there's another question of Mr. Donley. 12 13 Okay. Thank you, again. 14 MR. DONLEY: Thank you so much. MR. VANDERGRIFF: Is there a second to the 15 16 motion to table? Okay, there is not a second to the motion. 17 So my original motion is still on 18 MR. WALKER: the table. I would like to modify the motion that is on 19 the table to exclude the last sentence of her motion 20 there to allow for, I guess for lack of words -- this 21 22 enforcement of the position -- but what is your --23 Cheryl, read your last sentence. The last sentence. MS. JOHNSON: Would direct staff to allow Ford 24



time to adapt its program to comply with the new Code.

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1	MR. WALKER: Well, I think that we can't
2	that's open-ended.
3	MS. JOHNSON: And they have stated
4	(Simultaneous discussion.)
5	MR. WALKER: go on for ever and ever and
6	ever. I think that we need to modify that in some way so
7	that we either put a time frame on that or we exclude
8	that because I'm not real sure that we have the ability
9	to allow somebody to continue to do something in
10	violation of what the interpretation of
11	MS. JOHNSON: And I'm agreeable to identifying
12	in the motion that we have paperwork in front of us a
13	great deal of paperwork that says, By the beginning of
14	2011 they will have this fix prepared.
15	MR. WALKER: The first quarter.
16	MS. JOHNSON: The first quarter of 2011.
17	MR. WALKER: Which is a year. That's a
18	huge
19	MS. JOHNSON: A huge amount of time to change
20	payee.
21	MR. WALKER: a big company like that.
22	MS. JOHNSON: I think it's a pretty generous
23	motion, quite frankly.
24	MR. WALKER: I think that that's too much time,
25	in my mind. A big company like Ford who's got an IT
	ON THE DECORD DEPONTING



department that could probably change that in 30 days, 1 2 I'll bet you. MR. GILLMAN: Also, I think we're forgetting 3 the purpose of the law is to not discriminate against a 4 5 dealer and if you allow, you know, eight or nine months to go by, then you're going to have a dealer, some 6 7 dealers that are not going to be receiving payments. 8 MS. JOHNSON: And that was one of my questions. 9 To some extent, is what will happen to the dealers in 10 the interim -- are there incentive programs on the table 11 today and who's being paid? And, what I'm guessing, by what I've read, is that as long as the dealer agrees to 12 13 allow the employee to be paid, that the program will 14 exist. Well, the program -- I believe 15 MR. GILLMAN: 16 the program exists now. 17 MS. JOHNSON: As long as the payment is 18 being --It's going on now. 19 MR. GILLMAN: 20 MS. JOHNSON: Okay. 21 MR. VANDERGRIFF: Let us be clear, though, in 22 that one potential outcome and it's certainly been 23 identified by Mr. Donley and in the written presentations 24 as well, is that Ford's interpretation is that the dealer 25 choice is made at the very beginning of the program and,



therefore, this language in the statute doesn't apply, 1 2 particularly as written. If that's the case, then they could very well 3 elect to pull the program from the Houston region or 4 elsewhere in the state so understand that that is a 5 choice they could make. 6 7 MR. GILLMAN: But as he stated, it's clearly their money. But they still have to comply with this 8 9 law. I think. 10 MS. JOHNSON: And in the interest of time and 11 if it clarifies it, I will amend my original motion to adopt the informal opinion of staff. 12 13 MR. WALKER: And I will second that motion, if 14 you drop the last part off of that -- that you just did. MS. JOHNSON: I just did. 15 16 MR. WALKER: Thank you. Then I'm in agreement with her motion. 17 18 MR. VANDERGRIFF: Okay. We now have a motion and a second. Do we have any additional discussion on 19 the matter? 20 21 Would you restate the motion. SPEAKER: 22 MS. JOHNSON: The motion was to adopt the 23 informal opinion of staff. 24 MR. VANDERGRIFF: Mr. Bray, do you -- I know 25 you took some effort to draft some particular language.



Do you have any language you'd like to -- in light of that -- to suggest or is it sufficient with what she said -- with what Member Johnson has said.

MR. BRAY: No, I'm comfortable with it. There was some discussion I'd like to clarify, if I may, that I was quoted as saying that the statute speaks of money to be paid to a dealer and Mr. Donley went on and it was kind of hard to tell if he was trying to quote me or not but I didn't say the things he said after that and I would just like to say that the whole point of that sentence was only to point out that it — the statute specifically says "money." I was only pointing that out because there are other kinds of SPIFFs that factories award and it's not money and I just wanted to be sure that we were all clear on what we were talking about, which was "money."

So, yes, sir, I am totally comfortable with that.

MS. JOHNSON: Before we take a vote, if I could ask Mr. Bray or, if you would, Mr. Serna, to direct this question to the appropriate staff, what will happen in the interim until Ford adopts its program?

MR. VANDERGRIFF: Are you speaking in terms of any type of enforcement action?

MS. JOHNSON: Yes.



MR. BRAY: Well, absolutely nothing will happen without Mr. Serna okaying it, given the level of this discussion but I -- but given the sentiments expressed and frankly the staff's own concerns -- scepticism about abilities to make these kinds of changes, it will go under investigation at this point to find out why.

In the event that we're not satisfied with their efforts, we'll bring an enforcement action against them, of some sort, and there'll be a hearing. It will go through the process I've described for you. The question for me that's left on the table is, if your previous motion had passed and they had been allowed time to -- the first quarter of 2011 and Mr. Donley said they fully intend to go ahead and change the system so that the payments are to the dealer, it's still unclear to me if Ford intends to maintain that other process, the preliminary process of requiring dealers to elect in or out and that's another investigation.

MS. JOHNSON: Okay.

MR. VANDERGRIFF: I think we do have a motion and a second on the floor. Seeing no indication of any further discussion, I would --

MR. RODRIGUEZ: I have a question, Mr. Chairman.

MR. VANDERGRIFF: Sure.



MR. RODRIGUEZ: The motion is -- my clarity is 1 to adopt the informal opinion? I'm not really clear on 2 what we're doing here. 3 MR. VANDERGRIFF: That is my understanding of 4 the motion, just basically, to make that a formal 5 opinion, from this Board. 6 7 MR. RODRIGUEZ: So we are, in essence -- the motion is to approve the request for a formal -- is that 8 what it is? 9 10 MR. VANDERGRIFF: Yes, in effect, yes. 11 MR. SERNA: If I understand correctly, I think the motion that Vice-Chair Johnson made was to adopt as 12 13 the formal opinion the informal opinion that had been issued by staff. 14 15 MR. RODRIGUEZ: I didn't hear that so I was 16 just making sure that that's what you meant. MR. SERNA: That's what I was hearing is that 17 not to allow the request of a formal but rather staff had 18 issued an informal, to adopt that informal as this 19 Board's formal opinion. 20 21 MR. VANDERGRIFF: And, if I didn't say that, I 22 apologize. That's what I thought I said. 23 MR. SERNA: So, it would conclude -- it would, 24 in essence, conclude this piece of business.



MR. VANDERGRIFF: Okay. Any further questions, 1 2 discussion? Then I would call for your vote approving the motion by raising your right hand, please. 3 (A show of hands.) 4 MR. VANDERGRIFF: The motion carries. 5 And any of those opposed, please raise your right hand. 6 (A show of hands.) 7 MR. VANDERGRIFF: With Member Rodriguez voting 8 Eight to one, otherwise. 9 against. 10 All right, with that, in the interest of 11 obviously moving this along in the timing that we might have of potential conflicts with members and their 12 13 schedule, move directly to -- actually, I have one item 14 that's of a personal note because we do have on our agenda to make note of some employee recognitions, 15 Briefing Item 2.A.7 and then we're going to go out of 16 order on one of them because of a conflict that person 17 18 may have; one of the ones we want to recognize and I would ask Linda Secord to come up, please. 19 MR. SERNA: Good questions for you, as a matter 20 of fact, Ms. Secord. 21 MR. VANDERGRIFF: We should probably do that, 22 23 for old times' sake. We would like to note -- Linda, of 24 course, has been our Interim General Counsel for the

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Department of Motor Vehicles from the inception, really

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before the inception. She was appointed to that position in October of last year and continued until present day and served us very ably and very distinctly in addressing the issues of a start-up agency.

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I know, personally, for the many hours I spent with her, I have a sincere appreciation for her skill, her dedication and I know that many of the members who are with us during some long hours of interviews and discussions in executive session and here at this Board meeting, we all very much appreciate the efforts that she's made and I want to read to you a little memento of your service that we have to present to you. "The Texas Motor Vehicle Board presented to Linda B. Secord, in recognition and appreciation for outstanding and dedicated service, as Interim General Counsel to the newly created Texas Department of Motor Vehicles, May 13, 2010" and all the names of the members as well as Ed Serna, the Executive Director, along with a gavel that you might have wanted to bang down on either mine or one of the collective heads of the group that is here before you but we thank you very much for your service.

(Applause.)

MR. VANDERGRIFF: We're now going to take up -I'm going to grab one here just so we can get one done
real quickly. This would be 6 (c), which was a



Consideration of Proposals for Decision Under Occupations
Code regarding some warranty performance complaints.

It's my understanding that the parties are not here and if they are willing to have this motion dismissed so, with that, I would ask for a motion, please, from the Board.

MR. CAMPBELL: So move.

MR. RUSH: Second.

MR. VANDERGRIFF: I have a motion from Member Campbell and a second from Member Rush and with that, would call for your vote, please, a "Yes."

Mr. Bray, in an abundance of caution, is correct in making sure that I call and see if anyone from either party, which is Jerry Armstrong or Ford Motor Company, is here, wishing here to go back and make a presentation. And seeing none, then I'll go back to the motion and the second and calling for your vote by approving the motion by raising your right hand. I want to give us the feel of getting one done quickly.

(A show of hands.)

MR. VANDERGRIFF: So, with that, I will go now to Item 6.B on our Agenda, which is the consideration of a motion to appeal SOAH's statutory stay in Carduco versus Mercedes-Benz. And we do -- we are allowing 15 minutes for each side.



MS. MARZETT: Mr. Chairman, just for the 1 record, I just wanted to express, I am employed by 2 Daimler Financial Services, an affiliate of MB-USA so, 3 due to a potential conflict of interest, I'm recusing 4 5 myself of any action taken concerning this matter. 6 MR. VANDERGRIFF: All right. And I do want to note that Member Rodriguez has left the room. 7 He has told me he is excusing himself so I'm not sure -- our 8 9 Executive Director, Mr. Serna, following him out the 10 door, so we may have more reason for that or he may be 11 simply having to leave so we'll have two members that won't be present on this one. Mr. Coffey? 12 13 MR. COFFEY: Mr. Chairman, Board members, those 14 of you do not know me yet, my name is David Coffey --15 MR. GILLMAN: Mr. Coffey, let me excuse you 16 just one second --17 MR. COFFEY: Yes, sir. MR. GILLMAN: If I abstain, do we still have a 18 quorum? 19 20 MR. VANDERGRIFF: That would put us down to 21 six. Yes. I also would like to abstain. 22 MR. GILLMAN: 23 MR. VANDERGRIFF: Okay. We have Member Gillman 24 also abstain so we have six representatives of the Board 25 hearing this particular case.



MR. COFFEY: Thank you, Mr. Chairman. Thank you, Board members. Again, my name is David Coffey. My office represents Carduco, Inc., which is the protestant in this matter. Carduco's position today is going to be handled by my associate, Mr. Alaniz but prior to turning the matter over to him, I want to introduce my clients. They are sitting to the right of Ms. Phillips. If they could stand when I point to them, at least Renato -- Renato Cardenas the dealer principal for Carduco, Inc.

To his right, should be on the stand, would be Mrs. Cardenas and to his right -- Renato's right -- Rick Cardenas. The whole family is here, very -- from Brownsville -- very interested in these proceedings and we're pleased to be here and with that I'll turn it over to my associate, Mr. Alaniz.

MR. ALANIZ: I would like to reserve the remainder of my time for rebuttal. May it please the Board. My name is Martin Alaniz and I represent Carduco, Inc., a Mercedes-Benz dealer in Harlingen, Texas.

MR. VANDERGRIFF: I'm sorry. I didn't understand -- the remainder of your time? You have 15 minutes and you've used one so you've got 14 minutes for moving forward so I will try to alert you when you've got five minutes left.



MR. ALANIZ: Okay. We are here today appealing the SOAH ALJ's ruling on the effect of the statutory stay and our Cease and Desist motion. In this case MB-USA is putting a new dealer in Carduco's assigned trade area and near the location where Carduco has applied to relocate.

The SOAH ALJ is allowing this to happen despite the statutory stay preserving the status quo. To my left you will notice a map of the Rio Grande Valley. In April, 2008, Carduco filed an application with Mercedes-Benz USA to purchase the Harlingen Mercedes-Benz franchise from the existing Cardenas Autoplex dealer. Carduco went on to spend \$7 million, with the intent of relocating the dealership to McAllen, Texas. MB-USA was made aware of this intent.

While this was going on, unknown to Carduco, MB-USA was in discussions with another dealer, Heller-Bird Motors and entered into a Letter of Intent for a dealership in San Juan, Texas, on October 1, 2008.

Carduco's franchise agreement with MB-USA contains an area of influence addendum or AOI addendum that includes the Harlingen and McAllen area and which, if you look at the map, in the entire area surrounded in blue, including the Rio Grande Valley.

If you look at the area to the west, covered in yellow, that is an area that will be or has been taken



away from Carduco to be assigned to the new dealer

Heller-Bird in San Juan, Texas. Carduco will only be

left with Cameron County, one of the poorest counties in

the nation, in which to sell some of the most expensive

products on the market.

If you look at your Tab 3 in front of you, you will notice you have a map with the \$100,000 income house-holds and above in the Rio Grande Valley. You will notice the blue dots, which represents 20 households are all clustered in the McAllen area.

On August 18, 2009, Carduco learned about the modification and shortly after, filed a Section 2301.454 modification and a Section 2301.464 relocation protest at the Motor Vehicle Division. When a protest is filed at the Motor Vehicle Division, an automatic statutory stay issues under Section 803 and this preserves the status quo between the parties so that the Board can make the final decision.

When the motion to clarify the stay was brought before the SOAH ALJ, his ruling vacated the stay, allows Heller-Bird to build a new facility and go operational in Carduco's AOI while the issue of whether it is lawful for MB-USA to make this modification or even to reject Carduco's relocation to McAllen, is still before the Board.



To allow the stay to be interpreted this way would result in the immediate economic damage to Carduco, that we are seeking to avoid through our protest. This interpretation constitutes a premature decision on the merits, against Carduco, before the case has even been tried.

If the Board were to decide to allow Carduco to relocate to McAllen, Texas, while already letting a MB-USA appointed dealer in San Juan, Texas, it would make it ineffectual, because you couldn't have two dealers right next to each other.

Our interpretation of the stay averts this dilemma. Now, let's look at the statutory stay law, under 2301.803. In pertinent part, it reads, "On the initiation of a Board proceeding, a person may not allow or commit any act or omission that would violate this Chapter, affect a legal right or tend to render ineffectual a Board Order in the pending proceeding."

Per the last section, this is exactly what would happen if the ALJ's decision is not overruled.

Now, in addition, Carduco also requested a Cease and Desist Order, under Section 802. This allows the Board to -- this allow, in pertinent part, under Section (b), an interlocutory cease and desist order may be granted if



the order is necessary to maintaining the status quo between two or more adverse parties before the Board.

And this is essentially what we are here for today. We're asking for the status quo to be preserved. That status quo currently has an AOI for Carduco, which includes the entire Rio Grande Valley and includes the entire Rio Grande Valley without it being modified.

Secondly, you can issue it if a person is performing or about to perform an action that would tend to render the Board's order in the case ineffectual.

Having a dealership go operational during this case would make any order ineffectual.

Finally, I want you to look at Section 2301.454 (d) of the Modification Code. The Modification Code specifically states that the prior franchise continues in effect until the Board resolves its protest.

Now what the Carducos here are asking the Board to do is consistent with the Motor Vehicle Division's past practice. The Motor Vehicle Division has previously held that AOI Addendums are part of a dealer's franchise agreement and in order to modify them, a manufacturer must follow the procedures of 454.

Secondly, when this very same stay issue came before the Motor Vehicle Division in Cardenas v. GST, GST's motion to lift the stay and appoint a Brownsville



dealer in Cardenas' trade area while the case was pending was denied. This was also affirmed by the Director Brett Bray and is included in your Tab 5 for your review.

Therefore, we believe that it is the practice of the MVD that a manufacturer can not appoint a dealer to occupy a disputed trade area prior to the MVD resolving the legality of that modification.

Now the issue on the relocation application is an issue of first impression for the agency. Now, if the Board -- here we have Carduco applying to relocate to McAllen and in order to get around this, MB-USA just -- We're going to put a dealer in San Juan, which would make any denial ineffective or any ruling ineffective. So, we ask the Board not to let MB-USA do that today.

Now, MB-USA has three main arguments, which are essentially, one, Carduco's AOI addendum does not constitute an exclusive area. Second, MB-USA has not modified Carduco's AOI yet. And finally, that Carduco does not have standing to protest Heller-Bird under an unrelated and un-pled 652 protest section.

All three arguments are without merit. First of all, the AOI addendum is part of its -- Carduco's franchise with MB-USA. Any modification to that addendum is actionable under Section 454. Therefore, we submit to you today that a dealer has a protected right and legal



interest in its AOI, under Texas law, and distributors cannot add or relocate dealers to that AOI without proving good cause under Section 454.

Carduco does note that its AOI is not exclusive in the sale of cars. Other Mercedes-Benz dealers can sell cars until its AOI, it just cannot be modified without going through a proper procedures.

Next, MB-USA argues that they have not modified Carduco's AOI yet, mainly because that modification does not happen until Heller-Bird goes operational. If you look at your Tab 15, you will notice Article E of the MB-USA franchise, of which they use to justify the violation of the law. If you look at the section and you read the last sentence it says, "Any such addition or relocation of a dealer will result in the alteration or adjustment of the dealer's AOI." Therefore, in other words, the modification to the AOI is self-actuating when a new dealer is added to the area of influence.

Now, the Texas Occupations Code, if you notice, the statutes are all prospective in nature. They intend to prohibit something before it happens rather than punish it after it happens.

If you look at Section 454, you will notice that it operates prospectively. You can see this in the phrases "may not modify or replace" and "if the



modification or replacement would adversely affect." The "may" and "would" are prospective. They're forward looking. They are intended to be actionable whether the modification has already occurred or whether it will occur in the future.

The next section, the statutory stay Section

The next section, the statutory stay Section 803, uses very similar language. It also says, "May not allow or commit any act or omission that would" -- once again, this language is prospective. It's prohibiting an act or omission before it occurs. But if you need something more explicit, we can look at the Cease and Desist section, which states that MB-USA is prohibited from doing something they are about to perform.

MR. VANDERGRIFF: You've got about four minutes left and I want you to make sure and keep that -- if you want to use it now, that's great.

MR. ALANIZ: I want to finish it now.

(Simultaneous discussion.)

MR. ALANIZ: I'm sorry.

MR. VANDERGRIFF: Okay. And then I'm going to ask you a question.

MR. ALANIZ: My last point is MB-USA tried to mischaracterize our position at -- as a disguised 652 ad point protest. This is mainly because we can not defend a violation of the Texas law under Section 454 and 464.



Therefore, we respectfully request the Board overrule the SOAH ALJ's order on statutory stay and cease and desist and prohibit the enfranchisement of Heller-Bird in Carduco's AOI while these proceedings are pending unless and until MB-USA gets a favorable decision.

MR. VANDERGRIFF: I understand from your pleadings why you're here but a process has been established that these cease and desist orders go through SOAH because obviously their proximity here -- it's not deciding the case on the merits -- that would eventually come back to this Board. Why are you here before us, asking for us to basically go past what has been fairly settled by both statute and by practice to allow SOAH to make these decisions and have us come and essentially overrule them? How do we have jurisdiction to do that?

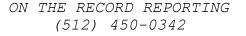
MR. ALANIZ: Okay. The Board does have jurisdiction and the new changes to the MVD rules have yet to be implemented -- they're still up for comment. First, for the cease and desist section, we can look specifically -- sorry, let me get that exactly for you -- under Section 2301.153(a)(18), General Powers of the Board, it gives the Board authority to issue cease and desist orders.

Secondly, as far as -- look at the

Administrative rules we currently have under 43 TAC 315



and 314. It's currently written in a way that says that 1 the ALJ shall prepare and submit to the Board a written 2 recommendation as to whether the stay should be modified, 3 vacated or clarified. And we have a similar section 4 5 under 314. Those are still the operating rules of the Board, until they're changed. 6 And we believe that under these rules and under 7 the Board's authority under 153, you still have the right 8 9 to make this decision and we simply believe that these 10 are matters -- because they pretty much decide the case on the merits, should be decided by the Board at this 11 point, rather than letting the case be decided and then 12 13 go through an entire hearing that will essentially not 14 make a difference because there's already a dealer operational. 15 16 MR. VANDERGRIFF: Do you want to reserve the last few minutes of your time? 17 Anybody have any questions? 18 MR. WALKER: Haven't the rules been adopted and 19 20 accepted, though? MR. VANDERGRIFF: Our rules have been adopted? 21 22 23 MR. WALKER: Yes.



MR. VANDERGRIFF: He just said that they have

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not been accepted.



MR. ALANIZ: I understood that they were put up for comment on the <a href="Texas Register">Texas Register</a> and -- actually, you're correct. You're correct. I am wrong. The point being is that we believe that these were the rules that were the rules during the time at which we filed this protest and when this case was actually current. And because those were the rules we were operating under, this case would actually go under the older rules rather than your ones.

MR. WALKER: So, you're saying we need to look at this retroactive to the rules, as they were back at that time and not as the rules are published today.

MR. ALANIZ: That is one way to look at it and the other way to look at it is the Texas Occupations

Code, under 53(a)(18) does give you the right to issue cease and desist orders so if you feel you don't have the right under the statutory stay, you could still have the right to issue a cease and desist order under the Texas

Occupations Code, to which isn't in conflict with the rules.

MR. VANDERGRIFF: Okay. You got questions?

Okay. We'll let you come back. I thank you very much.

Not sure we -- for Mercedes-Benz we have Mr. Buddy

Ferguson.



MR. FERGUSON: Mr. Chairman, members of the Board, my name is Buddy Ferguson. I haven't had the pleasure of appearing in front of this new Board. I've been representing manufacturers and even a few dealers before the Motor Vehicle Division, back when it was the Motor Vehicle Commission, back in the late '80s so, thank you for letting me come today.

I want to start off first with the question that was asked, You have no authority today, with all due respect, to take this up. The legislature, when it created the amendments back in 2007, it specifically said that hearings — a hearing under this subchapter is to be held by SOAH. It also said that your power and your authority to do any of these things, including to issue an interlocutory cease and desist order were sent to SOAH. That doesn't mean you don't have them but it vested SOAH with that power and so I don't mean this disrespectfully but this is a waste of your time to have to consider this because this is not properly before you at this time.

You've heard some questions -- I heard some questions about rules and those are very fair questions but the rules cannot extend beyond what the statute says.

For example, if you made a rule that you were going to -- if a manufacturer -- let's get something timely --



if a manufacturer paid employees directly without the dealer's approval, we were going to imprison the president of Ford Motor Company. I would suggest to you that that rule is beyond your statutory authority and, therefore, it would be a violation of the law and you can't do that.

We've pointed that out in our filings that regardless of what your rules are, the legislature has said, Hearings go to SOAH. SOAH has their own rules and SOAH has applied their rules and interpreted your statute.

And you may say, Well, wait a minute, Mr.

Ferguson, when do we get a swing at this? When you get
the swing at this is the legislature said, when a

Proposal for Decision is made at the end of the case.

Mr. Bray talked to you earlier about the process. That's
when this comes back to you and that's when you can look
at this. If they have an issue with the relief that has
been granted by the SOAH judge, then they need to go
somewhere else with that and not here. I would
suggest -- I haven't researched this, their avenue is
District Court or perhaps some other avenue of going to
do that. It's not here.

So, with all due respect to this Board -- I hate to show up, introduce myself and then say you have



no business in dealing with this but, effectively, that's what I'm saying.

MR. VANDERGRIFF: It's a very gutsy introduction too, by the way. I appreciate your doing that.

MR. FERGUSON: I've had the pleasure of meeting Mr. Vandergriff before so I was going to go out on a limb a little bit there. I've even been in Mr. Yoman's [phonetic] conference room and I know he kind of likes to get to the meat of the matter usually so I try to move ahead on that.

In any event, that's the first point is that we don't belong here. The second point is this, the statutory stay that is in place says to Mercedes, you can not modify this dealer's agreement until there's been a hearing. We have said we're complying with that, we will not modify it. What they are trying to do is prevent another dealer, Heller-Bird, from proceeding with a letter of intent that they received from Mercedes and that Mercedes-Benz has already issued an Evidence of Franchise under. Heller-Bird got that back in October of 2008, before these people were even a Mercedes dealer.

At the time, there was another Mercedes dealership there, in the Valley, that was owned by a member of their family. That dealership came under a



threat of termination for other issues and decided its best course was to sell out and they did. And we ultimately approved that.

But the gist of that, is there a cause of action, is there not, or whatever, I submit to you, is not for you to decide today. What they're here on is, you can't modify our dealer agreement. We agree, we're not going to modify it and we've said we will give notice before it's modified. And we haven't modified it.

The second thing they're here on is, they say you unreasonably withheld approval of our request to relocate. The request that they made ten days after Mercedes individuals met with them and said, We have appointed another dealer, we've issued an AOI. Then they came forward and said, We want to do this.

Now, had there been discussions with the prior dealer about moving to McAllen? Ultimately, when we try this case, there will be discussions that for two years they were trying to get something to happen and couldn't get anything to happen and move forward with someone else. But that's the other dealer. That's not even these people who are here today.

But, again, I bring that up for this point.

What I've just told you is what I believe the evidence

will be but in considering a cease and desist order, the



Supreme Court has said, in the Butnaru case, which was against Ford Motor Company, that was akin to a temporary injunction, which would necessitate a hearing at which evidence was taken.

You have no evidence to hear this. We have no court reporter who is sitting here. We have no one administering an oath, we're not calling witnesses and why? Because the legislature has said, We want the contested case hearings to go to SOAH. That's where they occur. The SOAH judge did not issue proposed findings of fact and conclusions of law, like Mr. Bray talked about, that you would get in a normal case.

The reason: he doesn't have to. It's not part of the procedures. So, again, as we go down this road, we keep bumping back into, the procedure's not in place to really make this run smoothly.

Now, and they're here and they may want to introduce themselves, Mr. Chairman, but Heller-Bird was a party in front of the Board. Heller-Bird was not invited to this proceeding today. Heller-Bird was not given the opportunity to file a briefing. I just -- we called them earlier this week to see if we had missed something because we hadn't seen anything from them and were they coming and the response we got was, What hearing?



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I'm not criticizing your staff, which it does a very good job and very accommodating with us in trying to balance some issues that we had about being here today.

But what I'm pointing out is, there's -- that's another indication of there's not even procedures in place for how to deal with this.

Let me move ahead further and try to tell you a little bit more. What they're asking you to do is overturn the work of a SOAH judge, who spent hours and hours reading motions, considering the affidavits that the parties filed and issuing -- not a proposal for decision but an interlocutory order. And he specifically said, What you're asking me to do -- well, not specifically. What he said, in effect, was, What you're asking me to do, the law doesn't provide. You haven't shown me a legal basis for this relief. And, I can read you those orders. We've asked that they be provided to you and I believe they have but this has been looked at, churned over, more lawyer hours than you could ever hope, if you're a lawyer, and it's been decided by somebody who has spent a lot of time -- this wasn't something that was mere happenstance.

Every argument that you heard made has been made already and has been vetted out in all of these orders. Order Number 2 specifically, Order Number 6,



talking about denying the interlocutory cease and desist order.

Mercedes-Benz has not done anything illegal.

Counsel said that we're trying to do something illegal

but this judge found that what we did was not illegal and
that we haven't tried to do anything that would violate a

Board order. Where's the Board order we violated? They
haven't shown that to you because they can't.

So, I would suggest to you that as you look at this, this is simply a mechanism by which a dealer, who's the next county over, and more than 15 miles away -- in fact, I think -- I may be wrong but I believe it may be 40, it may be 25, is trying to stop another dealer, who has already spent millions of dollars acquiring land, having architectural plans drawn, has secured economic development funds and now they're trying to put the kaput on that by coming after Mercedes and making us the bad guy when they know they have no right to stop the dealer, who's going in there, Mr. Heller and Mr. Bird.

So, that's the gist of what they're trying to do. I would suggest to you that today they're in the wrong forum and if they want that relief, they need to go elsewhere. Thank you.

MR. VANDERGRIFF: Thank you very much.



Any questions of Mr. Ferguson? I do not see any. Thank you very much.

And we would -- you've got four minutes to come back up if you'd like.

MR. ALANIZ: The most important question here is whether or not the Board has authority to be listening to these questions and deciding, basically, very important questions. You know, Buddy made a good point when he pretty much said, whatever the rules are, they don't overcome what the code says.

Under the Code, the Board specifically has the authority and the power under 153(a)(18) to issue cease and desist orders. Of course, you, you know, you choose the procedure you want to go through that but I want you to note is that when this decision was made by the SOAH ALJ, at that point he did not follow the Board rules, which were to issue a recommendation to the Board. Those were the rules we were under and had he done that, that recommendation would have come to you and you would have made that decision because that was before the rules were actually passed. So, therefore — so as far as the rules go, we believe that the Board does have this jurisdiction and should have this jurisdiction because this is very important. This decides the outcome of the case. These

are the merits of the case that are being decided here on 1 the statutory stay and cease and desist. 2 MR. VANDERGRIFF: You're referring to -- in 3 February Board meeting, when we were discussing -- we did 4 5 not take your -- you recognize we did not take any formal action at that point in time other than to just consider 6 7 it further and then, of course, at a subsequent Board meeting, we voted to approve those rules so you're aware 8 9 of that? 10 MR. ALANIZ: Yes, yes, definitely. 11 MR. VANDERGRIFF: All right. Any questions? Mr. Walker. 12 13 MR. WALKER: You -- in your earlier comments 14 that you made to us, you said that your clients, the Cardenas have bought or they've identified, I didn't 15 understand which is it, over in San Jose. 16 17 MR. ALANIZ: Sorry, sir. Say again? MR. WALKER: San Juan. You mentioned that 18 they're currently over in Harlingen. 19 20 MR. ALANIZ: Harlingen. Yes, sir. MR. WALKER: But that they are moving to San 21 22 Juan. 23 MR. ALANIZ: No. 24 MR. WALKER: That's what you said.



1	MR. ALANIZ: I'm sorry. Our dealer Carduco
2	is currently located in Harlingen, Texas. They have
3	given the intent to Mercedes-Benz to relocate to McAllen,
4	Texas, which is a neighboring community, slightly a
5	larger city to the west of San Juan.
6	MR. WALKER: So, you're saying that now
7	well, I know you said San Juan because I wouldn't have
8	come up with that name.
9	MR. ALANIZ: And that's where the new
10	dealership's going to be located for Heller-Bird.
11	MR. WALKER: Okay. So, you're client is going
12	to move to McAllen.
13	MR. ALANIZ: Right. And
14	MR. WALKER: Have they identified and bought a
15	piece of property?
16	MR. ALANIZ: Yes. Prior to this all happening,
17	they had taken MB-USA personnel down to McAllen, showed
18	them two locations of which they wanted to relocate to
19	and they said, you know, we'll consider this, we'll, you
20	know, take into consideration, you know, we even have
21	affidavits discussing this.
22	MR. WALKER: My question was have they
23	purchased the property?
24	MR. ALANIZ: At one point they had a contract
25	on



1	MR. WALKER: Have they purchased the property?
2	MR. ALANIZ: They have not purchased it.
3	MR. WALKER: Thank you.
4	MR. VANDERGRIFF: Any further questions? Thank
5	you very much. I appreciate it.
6	In essence, at this point, I will close our
7	presentation piece and submit this to the Board for your
8	consideration. If anyone has a motion, I'm happy to
9	entertain it. If you want further discussion before
10	that, that's good too.
11	MR. RUSH: I'd like to clarify as I heard it,
12	it's more than 15 miles away and in another county. Is
13	that correct?
14	MR. VANDERGRIFF: Yes, it is.
15	MR. RUSH: And my other question is, was I
16	think I understood it the dealership has been sold, at
17	some point in time. The in Harlingen. They
18	transferred ownership.
19	MR. VANDERGRIFF: Yes, they did.
20	MR. RUSH: Was the request to go to McAllen
21	prior to or after they completed the sale?
22	MR. VANDERGRIFF: It's in the pleadings but
23	I'll go ahead and let you answer that, if you would.
24	MR. ALANIZ: A formal application to MB-USA was
25	after the discussions happened from before it was sold.



Do you mean when they filed the application to Mercedes-Benz to purchase it? The discussions happened then and continued all the way until the day we filed an application with the --

MR. WALKER: And when did you file the application as relation to when they signed their letter of intent.

MR. ALANIZ: Yes. The application to Mercedes-Benz did come after the letter of intent from Heller-Bird that we did not know about.

MR. WALKER: Thank you.

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I should also point out, Board MR. COFFEY: members, that there was a discussion before the Cardenases had even purchased the dealership with MB-USA personnel, which is recorded in their documentation, to the effect that that discussion did occur. So they knew when they appointed Heller-Bird letter of intent, that we wanted to move to McAllen. They knew about it. They had been talking to the prior dealership for years about it. We don't really have a good record made, at this point in time, for why the prior dealership didn't go ahead and implement whatever plans it may have had but my clients, the Carduco people, made it very clear from before they purchased the dealership right up to today that they wanted to move to McAllen and while they were discussing

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that with Mercedes-Benz, Mercedes-Benz goes into an AOI with another dealer.

That's wrong. That's wrong to do that. It's wrong to take the best part of a man's market area away secretly and behind closed doors while, at the same time, he is telling you, I'm going to pay \$7 million for this dealership and they, for whatever reason, are saying, with another dealer, We're going to give you the best part of this man's market area and doing that before he writes the check; the \$7 million check. That is wrong.

We aren't here on the merits. What we are here on is whether or not they can go ahead and do what they want to do to harm my client while we are still arguing over the legality of whether or not they can do it to begin with. That's what we're trying to stop and if the statutory stay doesn't do that and if the cease and desist provision doesn't do that, it's worthless, absolutely worthless.

And, it is worthless to go forward with this case --

MR. VANDERGRIFF: Mr. Coffey, I've already let you exceed your time and go forward and so -- you know, I appreciate your sentiments.

MR. COFFEY: Thank you, Mr. Chairman.



MR. VANDERGRIFF: In the spirit of fairness,

Mr. Ferguson, if you want to say something. I know your

time's expired but you got a little extra.

MR. FERGUSON: Mr. Chairman, I think I'm fine

from those blows and I think there's probably courts in

Texas that can deal with those issues, if there's causes

of action, but I do think you might want to have -- Mr.

Bird is back here with his counsel. They are here today

Bird is back here with his counsel. They are here today if you want to see them. To just add up a human side to that side of the equation, as well.

MR. VANDERGRIFF: Thank you for attending. All right. Okay, with that, is there any further discussion?

Do I have -- I recognize that there are two members here who cannot participate in the discussion or the decision; they've abstained. Do I have a motion from any of the other members that are here?

I believe and I will ask Mr. Bray to identify this that if there is no motion then the request will fail for lack of any action from this Board.

MR. BRAY: Yes, that's right.

MR. VANDERGRIFF: All right. So I'll ask one more time if any of the members have a motion that they'd like to present on this to either grant or deny. All right, Mr. Campbell.



MR. CAMPBELL: What is the lack of a motion and 1 2 it fails. What is the next step? 3 MR. VANDERGRIFF: Mr. Bray? MR. BRAY: The parties continue with their 4 litigation back at the State Office of Administrative 5 Hearings. They leave here with no relief and just 6 return. 7 8 MR. CAMPBELL: And at the time they go through 9 that process, then does it come back before us? 10 MR. BRAY: You ultimately are presented with a 11 proposed final order and a proposal for decision. MR. CAMPBELL: Okay. Thank you. 12 13 MR. VANDERGRIFF: That would come after the 14 merits of the case, however long that takes -- or work its way through the system. 15 16 MR. CAMPBELL: Okay. MR. VANDERGRIFF: Well, seeing no motion from 17 18 any member, then, the request from the protestant has, in effect, been denied. We won't be taking any action. 19 20 Okay. Thank you very much. Thank you for attending. 21 I'd now like to move -- we will probably take a brief break although I would ask the Board how they would 22 23 like to proceed but we'll take one more matter up. 24 part of the things we covered in Executive Session and



then we'll discuss the taking a brief break or whether to take a longer break.

And that is, Action Item 4, it's actually Item 4.3 and I apologize for the misnumbering of our agenda on page 2 but it's the third item in Number 4 and it's the request for rulemaking from the Texas Automobile Dealers Association.

MR. BRAY: Mr. Chairman, Members. We -- do I need to wait on anyone or are we good?

MR. VANDERGRIFF: We are good. Member
Rodriguez has officially and permanently left the
building. I do want to note that his agency, his police
department is getting an award from -- I believe the
McAllen Chamber of Commerce tonight and he needed to
drive back for that for the exemplary service that they
have provided to their community. So, I was going to
congratulate him for that award in person but he, as I
said, left before we started this last hearing. So, with
that, if you'd like to introduce us, Mr. Bray, and then
we'll ask the representative from the Automobile Dealers
Association to make the presentation to us.

MR. BRAY: I would and I have one slide to help introduce it but I don't know if it's going to come up or not. This was a rule -- this was a -- this section or this agenda item was based on a request by the Texas Auto



Dealers Association and it's the Texas Auto Dealers Association and that material's in your packet, of course, for the Board to review and consider the possibility of conducting a rulemaking.

What this is about -- and Ms. Phillips will be making her presentation to you and I'm sure she'll more than fully cover this but I took the statutes that she discussed and they -- the relevant ones -- and I put them in a table for you and that's what's on the slide and I want to try and boil it down for you as much as I possibly can.

That first statute is the Tax Code and it says that -- and as you know, when you buy a car, there's sales tax involved and, setting aside registration and title and talking just about sales tax. This is the Comptroller's money. It goes into the General Revenue Fund, by and large. That tax is due on the 20th working day after the car dealer delivers the car to the buyer.

The next statute is the Texas Transportation

Code, 501.0234 and that says the dealers have to submit

title and registration applications on behalf of buyers.

I was around when this statute came around and a lot of

it has to do with getting rid of brokers, frankly,

because brokers are illegal in Texas and this kept the

titling process with the dealer.



The next statute is Transportation Code 520.031 and it says that the transferee -- okay, that's the buyer, that's the person getting the vehicle -- must apply for title and registration within 20 working days.

Now you'll see the arrows and what I intended to show by that is, it's a circular process. The buyer's supposed to apply for title within 20 days but the dealer's supposed to submit the title and registration on behalf of the buyer, ergo, -- and pardon the use of the word but the dealer has 20 days to issue the application for title and registration. I hope that's fairly clear.

It goes on in 0234 (sub f), to say the dealers have a reasonable time to comply and are not in violation if they make a good faith attempt to apply within the 20 working days.

And then, lastly, there is a Board rule and the rule -- and it's 144 (f) and says that a reasonable time is to comply -- to apply for title and registration is 20 working days or 45 days, depending on the type of sale. It does not define the circumstances that constitute a good faith attempt to apply for title and registration.

Now, I have more -- I can hold it or, at the Chair's convenience, I can give you the staff's thoughts and recommendations now or I can wait until later.



MR. VANDERGRIFF: I think we'll go ahead and let the party present, if that's okay.

MS. PHILLIPS: Thank you. I'm, once again,
Karen Phillips, for the Texas Automobile Dealers
Association. Based on the fact that more and more of the
dealers that I'm talking to, as well as their counsel,
have had requests to come before agency staff to explain
why they have not complied with the 20 days and because
after these different issues have arisen, oftentimes
penalties have been assessed.

And, there have been times when there has been a good faith effort to comply with the statute and to submit the paperwork within that 20 days but there are oftentimes circumstances beyond the dealer's control such as the dealer tenders payment to the lienholder on the trade-in and, for whatever reason -- that lienholder may be out of state, maybe they're holding the check for awhile, but the paperwork and the title doesn't get back to the dealer in as timely a manner as it's required to be.

There's another statute in the Finance Code that requires lienholders to tender the title back to the dealer within 10 days but that is sometimes not complied with, as I see Mr. Gillman smiling.



We're also finding that there are instances when the paperwork may not be getting to Austin in as timely way and manner as it needs to be and, once again, that's an instance that's outside of the dealer's control.

And, because there are many parties involved within the process and because the dealer wants to comply with the statute, there are times when it's impossible because of forces outside of his control, the good faith effort provision was placed within the statute.

And since I've been making a few visits with the dealers before some of the enforcement people here with the agency, we felt it might be time to have some direction so that we all know what the good faith effort provision allows for and to try to keep the penalties from getting too high.

I'm not trying to castigate or anything, I'm just saying that we do have -- we may have dealers who aren't complying in a timely manner and I'm not here to defend that. I'm just here to allow for some rulemaking to what is going to be a good faith effort so that the agency knows as well as the regulated community.

MR. VANDERGRIFF: Any questions of Ms. Phillips?



MR. GILLMAN: Are you asking for a specific 1 2 time or are you asking for -- what are you asking for? MISS. PHILLIPS: Well, to be honest with you, I 3 am asking that we discuss and work towards rulemaking 4 5 with respect to what is meant in the statute by "good faith effort." That's the only thing I'm asking for 6 7 today is that the staff and the regulated community work together to go forward with rulemaking. That's the only 8 9 thing I'm asking for today. 10 MR. GILLMAN: You're just wanting everybody to 11 study it some more. MS. PHILLIPS: I think it's time. 12 13 MR. GILLMAN: All right. What's the down side 14 of extending that 20 days? 15 MS. PHILLIPS: The down side? 16 MR. GILLMAN: Yes. I mean, what -- how can the 17 state of Texas get hurt or how can the public get hurt? What --18 19 MS. PHILLIPS: Well, first, to change the 20 20 days, it's going to require a statutory change and so 21 whether or not the legislature wants to make that change or not, I couldn't say. I know that the state needs 22 23 their money, the paperwork needs to flow quickly and 24 people need their title, people need to get the perfected lien done --25



MR. GILLMAN: How many -- how often does this happen?

MR.BRAY: This is the single largest complaint -- the single largest volume of complaints that the Motor Vehicle Division deals with. When I showed you the pie chart back in January, I believe, of complaints -- of concerns, the failure to pass title in a timely manner is the largest. How often? Several hundred -- over a thousand a year.

MS. JOHNSON: Mr. Bray, are those reasons, generally, justifiable or --

MR. BRAY: That's difficult to say because so many of them go in default, there's any explanation whatsoever -- the dealers are gone or whatever. There are a few times they're justifiable. The reason they're usually not, in my view, is because by the time it reaches our level, you're so far past the 20th day, it's not even a question. You're in the 90th day. You're in the 120th day. And, if you think about it, it's a bureaucracy. You can't go out and just write them a ticket on the spot for that.

MR. CAMPBELL: Mr. Bray, if I could. I think there's two different issues. You're talking about the dealers that are in violation, whether just strictly in



violation and I think what Karen is saying -- is it Karen?

MS. PHILLIPS: Yes.

MR. CAMPBELL: Is what you're talking about the people that are generally -- they're transferring everything, just like they're supposed to, on an appropriate time frame and then they get one trade-in or something that they can't get the title to. Because, in our experience, that's what we find is we're going along good and then, all of a sudden, we get somebody that, through an auction or something -- it gets lost, stolen, whatever, the lien's not paid off.

I'm not so concerned about the 20 days as much as I am your office coming to their headquarters and they've got a thousand deals that they've done all right and then they've got one that's in violation. That -- I would think that would fall into the category of good faith effort to comply, in general.

So, maybe in that one area of the "good faith effort to comply" and I don't even know what kind of limitations to put on it but I think that's what you're describing, aren't you?

MS. PHILLIPS: It's all we're asking for is to explore rulemaking on what is meant by "good faith effort," so we don't have a penalty.



MR. CAMPBELL: Well, I just --

MR. WALKER: It's already been defined.

MR. CAMPBELL: Do you --

MR. BRAY: Can I speak to that first? All I can tell you is that it's never worked that way before. The thousand that went through just fine, those are satisfied customers of your dealership. The one that didn't -- John Q. Public that's still waiting on their title 100 days later, that didn't go through. They complained to the agency.

I heard you say, Well, the 1000 went through and that should be the standard for a good faith compliance. We've never worked it that way before. We've never told a complainant, Nope, it's a statistical thing and your complaint doesn't matter. We go out and investigate the complaint. If the dealer is in the situation you described and there's -- it takes another 30 days -- first of all, it'll take us more than 30 days to get to the dealership so by the time we get there, the title passed.

And, secondly, dealers have opportunities to -- if the title's lost and gone, dealer's have opportunities to get certified copies of titles, dealers have opportunities to buy 30-day permits for customers to ride on tags. There's all kinds of mechanisms to satisfy



the situation. The only thing I can address is the fact that a complaint comes in by somebody who doesn't have their title timely and the thousands that did are just satisfied customers.

MR. WALKER: I recognize that. But when you say you have an opportunity to get a 30-day extension or whatever, you're still in violation. I mean, you still haven't transferred it in the 20-day -- you know, the time of period, so you're still in violation.

MR. BRAY: True enough but those kinds of things are, one, considered by the investigators, two, considered by Ms. Kent's prosecutors and three, considered by Administrative Law Judges before they'd be considered by you.

MR. WALKER: Right. But -- and I guess in our case, if we couldn't deliver the title, we'd just give them the money back or a different car or something and go that route. But I think the issue is not the 20 days because if you edge it another five days, that really probably wouldn't correct the problem that she's describing.

MR. BRAY: We never see a complaint of 25 days. Nobody ever complains that they didn't get their title five days late.

MR. VANDERGRIFF: Mr. Gillman?



MR. GILLMAN: How often do you do a good 1 2 faith -- how often do you say, Well, Mr. Dealer, we think, in good faith, you're doing the best you can here, 3 you know, we've got a problem with this bank and this --4 5 MR. VANDERGRIFF: I'm going to jump in and say by rule we've basically defined that reasonableness at 20 6 7 days. 8 Twenty days. That's correct. MR. BRAY: MR. CAMPBELL: So the request is for us to 9 10 consider to have this agency and regulated industries sit 11 down and discuss it. That's appropriate. MR. VANDERGRIFF: But that's -- I would also 12 13 ask, perhaps, there are some thoughts or comments you'd 14 like to deliver from the standpoint of -- I know you've been giving some of them as we go along. 15 16 MR. BRAY: Yes, sir. And the first is, there 17 18 19

has never been a time in my memory at this agency when we didn't sit down and discuss rulemaking so I don't think it's going to require you to order us to do that. That's always -- and I think Mr. Serna didn't have to be stronghanded about it, either. It's never been a problem. We can certainly talk about it.

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The problem is, in my view, is how to address it because the Chair's right, there is a rule in place. We worked hard to get that rule in place and I have a



concern about trying to define the phrase of "good faith attempt" and "reasonable time" because every instance, all 1300 of them, are going to be different.

One dealer's going to say his dog ate the title and that would be -- that's for somebody to determine if that's good cause or not, if that's a good faith attempt. The situation that comes up a lot, I'll tell you, where we see -- where we think is a good faith attempt, is now that the law has changed and the purchaser gets to elect which county tax assessor receives the title and registration fees, sometimes folks go to metropolitan areas and buy vehicles and require the dealer to send the money -- send the registration title back to their county. I hate to say this out over the internet because I don't want to give dealers the idea but the fact is, if, in our view, if they mail -- if they stick the title and registration in the mail to Galveston County from Dallas County on the 20th day, we think that's a good faith attempt and we've never taken action --

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MR. CAMPBELL: So you have done some good faith attempts.

MR. BRAY: Yes, sir. But that's just one kind.

To try to contemplate all of the possibilities of what



would be a good faith attempt, I think, is not a good 1 I think the legislature put a statute -- a 2 standard in place and what we're talking about is 3 possibly putting a standard over the standard. 4 5 The legislature said, Motor Vehicle Board, if a dealer -- if you find that a dealer acted in a reasonable 6 time and made a good faith attempt, there's no violation. 7 MR. GILLMAN: Well, from what I'm hearing from 8 Ms. Phillips, all she wants to do is have you guys listen 9 10 to her, which you say you've already done but she's just 11 I don't see any harm in that. asking. MR. BRAY: I don't either. 12 13 MR. GILLMAN: So, I -- so is it time to make a motion? 14 MR. VANDERGRIFF: Well, can I ask a question? 15 What's the -- historically, how did they come up with the 16 20th day in the first place, in the statute? 17 MS. PHILLIPS: That's before my birth. 18 MR. VANDERGRIFF: It's been there for 26 years? 19 20 MS. PHILLIPS: It's been there a very long time. Mr. Bray may be able -- I think since the 21 22 beginning of time, it's been 20 days. 23 MS. MARZETT: To that point, I think we're so 24 much more efficient so 20 days seems to me to be more reasonable now than ever before. 25



MS. JOHNSON: If I could ask, are we having an 1 2 issue with DMV allowing or at least considering what it may determine to be a good faith effort. Is that an 3 issue for the automobile dealers to the DMV? 4 5 MR. VANDERGRIFF: If I could jump in -- I understand the policy has been, at this agency, and then 6 7 we previously -- well, it was a part of TxDOT and then we 8 basically adopted that position with the rule is that we 9 didn't attempt to go beyond what the statute said. 10 said 20 days so we said, That's reasonable except there 11 are some edges of that, like, for example, what Brett has alluded to; if it's put in the mail because of the new 12 13 statute that allows you to request the county it be 14 registered in, that that -- even though it might not be registered in 20 days, that constitutes good faith 15 reasonable effort. 16 17 But, is that summarizing correct, Mr. Bray? 18 MR. BRAY: Yes, sir. MR. WALKER: Ms. Phillips. You're asking us to 19 20 re-evaluate reasonable time, I quess, or good faith? 21 MS. PHILLIPS: I don't know if I'd characterize it as re-evaluate it. I think that --22 23 MR. WALKER: Well, what are you asking us 24 today?



1	MS. PHILLIPS: I think it's time to evaluate
2	it. I mean, based on the meetings that I've had with
3	dealers and their counsel, they will get a complaint that
4	may have numerous alleged violations on it. They will
5	then need to come forward to show that they have made a
6	good faith effort in each and every one of those
7	instances.
8	MR. WALKER: Do you have a specific example you
9	can give to me today?
LO	MS. PHILLIPS: I have a complaint or two back
L1	at my office, if you'd like for me to send it to you.
L2	MR. WALKER: Well, I just would like to know
L3	what a reasonable attempt would have been made that we
L4	pursued, from the opposite standpoint where we said it
L5	wasn't reasonable.
L6	MS. PHILLIPS: Well, the discussions that I
L7	have had with the dealers and agency enforcement
L8	attorneys at this time, are still all under discussion.
L9	MR. BRAY: By discussion, there are potentially
20	contested cases. Right? They are filed petitions.
21	MS. PHILLIPS: Exactly. They were filed
22	petitions.
23	MR. BRAY: So, her reluctance might be to
24	discuss with you a live case. The situation, in very
25	general terms, that I remember, as we sat down some time



ago, involved a very large San Antonio dealer who, I'm sure you'll recognize and there were like 900 complaints.

MR. CAMPBELL: That he's not transferring the titles to the purchasers.

MR. BRAY: Yes, sir. And --

MR. CAMPBELL: See, that's a different -- to me, that's a different -- that's just total violation and you need to nail him on whatever he's doing wrong but if you've got -- if that same dealer had been going along and he was doing everything right and then he has one of these problems and ends up with a complaint, that may be where you would have the good faith effort or good faith attempt because he's got a pretty good history showing that he goes and gets his titles, pays for them, gets them transferred and pays the taxes --

MR. BRAY: I completely agree with you. All I ask is that you show us the case where we didn't take that into account or where you didn't show us the error of our ways already.

MR. CAMPBELL: No, I guess my question is, I think for the other dealers that I would be talking about is -- the concern is, they're getting fined if they're in violation. If it's somebody like a dealer that's in San Antonio that is always late, never does it on time, gets a lot of complaints, that guy's not going to last that



1	long in business, I wouldn't think. Or, he shouldn't
2	last that long in business and, even if he does, he
3	should pay the state all fines he can.
4	But the guy where Ramsay Gillman's
5	transferring his stuff pretty consistently, within the
6	time frame, I hope.
7	MR. GILLMAN: I hope, too.
8	MR. CAMPBELL: But, where he is and then he
9	gets a trade-in that is delayed, for whatever reason, it
10	would be pretty evident in my you know
11	MR. BRAY: I don't understand. You want to
12	bring up an individual situation and somehow or the other
13	you seem to be indicating that in that individual
14	situation, you already know what it is the agency did
15	and
16	MR. CAMPBELL: Well, I don't know. I mean, are
17	they given the latitude to say I mean, do you have the
18	latitude or do you take the latitude to say, Okay, this
19	dealer's been doing it consistently right
20	MR. BRAY: Yes.
21	MR. CAMPBELL: for a period of time and,
22	yes, he has a problem here.
23	MR. BRAY: Yes.
24	MR. CAMPBELL: Do you still hit him with a \$500
25	fine?



1	MR. BRAY: It depends on each situation is
2	individual.
3	MR. CAMPBELL: But you're saying that you are
4	taking that latitude to vary it a little bit.
5	MR. BRAY: Yes.
6	MR. CAMPBELL: And I have no problem with that
7	if
8	MR. BRAY: A dealer's history is always taken
9	into account; every single case.
10	MR. CAMPBELL: And I asked a question a while
11	ago. I said how often does this in other words,
12	you say you take into consideration every single time.
13	MR. BRAY: Every single time there's a
14	complaint and I thought your question was how many
15	complaints are there?
16	MR. CAMPBELL: No. If you get a complaint
17	
18	MR. BRAY: Thirteen hundred a year, more or
19	less.
20	MR. CAMPBELL: Thirteen hundred a year, more or
21	less. How many of those result in you going to the
22	dealer and saying, Mr. or Mrs. Dealer, you know, you're
23	really trying to do the right thing. Let me explain to
24	this customer that's got a bank in Pennsylvania that
25	won't send you the title.



1	MR. BRAY: We don't go into a dealer it's my
2	understanding and I don't do this day-to-day. We don't
3	go into a dealer and say anything. We don't go in and
4	say, You're doing the right thing or you're not doing the
5	right thing. What we go in is ask to see the sales file
6	to see if the complaint even has merit.
7	By the way, a goodly number of complaints are
8	dismissed as without merit. We don't even take them any
9	further.
10	MR. CAMPBELL: Then you're being fair, that's
11	all I'm asking.
12	MS. JOHNSON: And then, one additional
13	question. Should you determine somebody has not made a
14	good faith effort within a reasonable time
15	MR. BRAY: When you say You, you mean the
16	staff.
17	MS. JOHNSON: With the staff. Is there not an
18	opportunity, and I think I know the answer to this
19	already, for your decision to be appealed to us so we
20	have the chance to determine ourselves whether a good
21	faith effort would be made.
22	MR. BRAY: The decision that's made at the
23	staff level is whether or not to take it to a decision
24	maker, which, ultimately, is you.



MS. JOHNSON: So we do have an opportunity.

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MR. CAMPBELL: One of those is agreed orders, 1 2 aren't they? 3 MR. BRAY: The dealer -- yes, sir, and that's exactly what they are, is agreed orders. 4 5 MS. JOHNSON: Thank you. MR. BRAY: The dealer decides that, you know, 6 that I don't really want to take this to the Board. 7 MR. WALKER: Did I understand you right, we do 8 9 1300 complaints a year? 10 MR. BRAY: Yes, sir, we receive about -- and 11 that's rough -- but about 1300 or so of this kind of complaint. 12 13 MR. WALKER: That's what I was referring to. 14 MR. BRAY: For failure to pass title timely. MR. WALKER: And, prior to that, you made a 15 statement that 900 of those were from one dealer in San 16 Antonio? 17 18 MR. BRAY: No, sir. I'm sorry. That's part confusion. A complaint that comes in the door is on a 19 20 like a case-by-case basis. What happened in this instance, I believe -- and Ms. Kent's in the room and she 21 22 can elaborate on this to your heart's content, but the --23 a complaint or so caused us, I believe, to study this 24 dealership and the computer itself kicked out that there



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were 900 of them that weren't done timely.

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MR. WALKER: Okay.

MR. BRAY: So, that 900 -- and that's not uncommon. When I say there are 1300 complaints, there could be many multiply times that the title was not -- that a title was not transferred timely within a complaint.

MR. WALKER: Do we have a statute that specifies the 20-day or is it just a rule?

MR. BRAY: If you'll look on the screen there are two statutes; one that requires sales tax and one that requires title and registration and they both are kind of tied together.

MR. WALKER: So, if it's a statute then it's set in law and so Ms. Phillips, in order to change that, we couldn't do a rulemaking to change the law, the law has to be changed through the legislature, is that --

MR. BRAY: Well, the statute goes on to say that a dealer has a reasonable time to comply and that he's not in violation or she's not in violation if they make a good faith effort. That's in the statute and then what Boards do is go along and interpret statutes, by rule.

MR. WALKER: So, the statute says 20 days. The statute then goes forward to say but by reasonable



1	attempt and so our interpretation of reasonable attempt,
2	when we posted our rules, is 20 days.
3	MR. BRAY: It's presently on the books at 20
4	days and 45 for seller-financed.
5	MR. CAMPBELL: Twenty working days.
6	MR. BRAY: Yes, sir, 20 working days.
7	MR. WALKER: And Ms. Phillips is asking us to
8	re-evaluate she didn't like that word, maybe, but to
9	go back and look at that again and determine whether 20
10	days is reasonable? Is that
11	MS. JOHNSON: I think what she's asking for,
12	we've defined reasonable time but we have not defined a
13	good faith effort and I'm not certain it sounds like
14	that
15	(Simultaneous discussion.)
16	MR. WALKER: Well, how do you define good faith
17	without defining the time well, I guess you could.
18	MS. JOHNSON: You can't.
19	(Simultaneous discussion.)
20	MR. VANDERGRIFF: Well, it certainly moderates
21	what the 20 days stands for. If either that is the
22	good faith or not.
23	MR. WALKER: Well, what I really would have
24	liked to have seen today would have been where she says,
25	We did something that there was a good faith effort but



that we determined that it wasn't a good faith effort and 1 2 she's not shown us that today. Is that not --3 MS. PHILLIPS: That's correct. I have not 4 5 shown you a specific example. 6 MR. WALKER: And Mr. Bray has said that we do 7 give a good faith effort, almost in all cases, and we 8 don't stop at 20 days, we go beyond that -- 60 days if we 9 think that there's been a good faith effort. 10 Is that not correct, Mr. Bray? 11 MR. BRAY: Well, what I'm saying is --MR. WALKER: Just -- you don't -- it's not set 12 13 in hard stone, the way the department looks at it on a 14 20-day period. Is that correct? 15 MR. BRAY: That's right. MR. WALKER: Okay. Well, then, I think we're 16 doing everything --17 Excuse me. I don't want to mislead 18 MR. BRAY: The law is the law and the law says 20 days and we 19 20 don't say that that's not the law, I'm just saying that by the time we work a case, we don't work 21-day cases, 21 22 we just don't. 23 MR. CAMPBELL: Ms. Phillips, can you be real 24 specific about what you want us to do?



MS. PHILLIPS: Absolutely. First of all, 1 understanding that the statute says 20 days and 2 understanding that the example that Mr. Bray gave about 3 the dealer who got a very lengthy complaint filed against 4 5 him because the agency now has the capability of going to a computer system and checking to see how many 6 7 transactions are outside of the 20 days. A complaint then was generated, and it's not just one -- I've been 8 9 over here more than once -- and will have multiple 10 transactions on there and because there is a good faith 11 effort which tempers the 20 days, then I'm requesting that we have some quidance, either by rule or -- by 12 13 rule -- that's what I'm asking for -- as to what is meant 14 by good faith effort because when the dealer and the counsel come to discuss the issue with the attorneys in 15 16 enforcement, it's always questioned as to what is meant 17 by good faith and so counsel now is asking what is meant 18 by good faith and it's not defined. 19

MR. CAMPBELL: You're saying this dealer that you're speaking in terms of has multi violations so he would --

MR. BRAY: Just an example.

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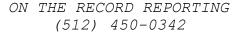
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MS. PHILLIPS: Well, it's questionable as to whether or not they are violations or not, depending upon what you -- what good faith is. He's arguing that he



doesn't have 900 violations or whatever the number is 1 2 because he has made a good faith effort. It may be 25 3 days, it may be --MR. CAMPBELL: But, is he -- I mean, there's 4 5 other dealers with the same type of volume --MS. PHILLIPS: Yes. 6 MR. CAMPBELL: Is he in line with those dealers 7 or are they able to do it and he's not? 8 9 MS. PHILLIPS: Well, we had another dealer who was fined -- I think it was in the hundreds of thousands 10 11 last year on this very issue and the issue came up, what is good faith and oftentimes it's a penalty, as you can 12 13 imagine, can get exacerbated rather quickly and -- I'm 14 not trying to cast aspersions on anyone, please keep that in mind, but I think we need some guidance on what is 15 meant by good faith. That's all I'm asking for is that 16 we explore the issue together as to what is meant by 17 "good faith effort" with respect to this statute. 18 MR. VANDERGRIFF: If I come back to what you 19 said earlier in all this, you were asking the staff and 20 the regulated community to study the issue and come up 21 22 with a better recommendation on reasonable time and good 23 faith. That's what I wrote down. Is that correct?



MS. PHILLIPS: As to what is meant by "good

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faith."



1	MR. VANDERGRIFF: Okay. Reasonable time, not.
2	But, what is meant
3	MS. PHILLIPS: I'm sorry. If I said reasonable
4	time, I misspoke.
5	MR. VANDERGRIFF: All right.
6	MS. PHILLIPS: I'm just asking for good faith
7	to be to get some guidance and rulemaking on what's
8	meant by "good faith."
9	MR. VANDERGRIFF: So to be clear to everyone,
10	that is the request is not a specific recommendation on
11	good faith. It's just that the staff and the regulated
12	community study the issue and come up with I guess,
13	potentially but a better recommendation on "good faith."
14	MR. CAMPBELL: And if we could do that I'm
15	sorry.
16	MS. MARZETT: I just wanted to ask, are you
17	requesting that they suspend the violations until this
18	definition is or not?
19	MS. PHILLIPS: No, ma'am. I'm not.
20	MS. MARZETT: Okay. Okay.
21	MS. PHILLIPS: Because we have ongoing cases
22	out there I'm not asking for any suspension.
23	MS. MARZETT: Okay.
24	MR. VANDERGRIFF: You know, the Executive
25	Director just brought up something. We're going to cover



advisory committees in our -- one of these next sessions 1 2 or next items coming up but this could be a very appropriate topic to refer to that advisory committee. 3 MS. JOHNSON: So then, do you require a motion 4 5 in order to assign this to an advisory committee as appropriate to work with the affected industries and --6 MR. VANDERGRIFF: Well, I think, really, at 7 this point, we could talk about that perhaps later but 8 9 just, if you want to recommend that the staff and 10 regulated communities study it, then I think it will flow 11 to that logically here in a few minutes. MS. JOHNSON: I so move. 12 13 VOICE: I second it. MR. VANDERGRIFF: We have a motion and second. 14 Discussion? 15 MR. CAMPBELL: And TADA -- and I'd also like 16 the TIADA or any other affiliated dealers to be involved 17 18 in that process because they've got the same issues. MS. PHILLIPS: Absolutely. 19 20 MR. VANDERGRIFF: Okay. We have a motion and a second. Do we have any further discussion? I might ask 21 you to approve the motion. If you do so, raising your 22 23 right hand in support of the motion.



(A show of hands.)

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MR. VANDERGRIFF: Mr. Gillman, are you in favor of this motion or are you against this?

MR. GILLMAN: I am in favor.

(Ayes.)

MR. VANDERGRIFF: Okay. The motion carries eight to -- with Mr. Rodriguez being absent. Thank you very much. Okay. We have reached the end of the -- I guess, the request portion of the agenda. We do still have considerable briefing items. Hopefully, many of them will be very short and three action items.

I will look at the pleasure of the Board but this might be an appropriate time to adjourn the open session, return into Executive Session, eat our very cold -- stale, perhaps, lunch while we're performing a few more executive session items and then come back out to finish this agenda. Is that appropriate or would you prefer to plow ahead? Okay.

Let me make sure that I follow all the appropriate script here. I have too many of these open -- here it is. We are going to take a short break and then go into closed session. It is now 1:25 p.m. on May 13, 2010. We will go into closed session at approximately 1:35 p.m. under the following sections of the Texas Government Code: Section 551.071, to obtain the advice of legal counsel regarding agenda items



2.A.1.a, 2.A.1.b, 2.A.2.1 and b, 2.A.3, 2.A.4, 2.A.5 and 4.1, 4.2, 4.4 and also, potentially to discuss personnel matters under Items -- again going through those 2.A.3 would be the item there we would do.

So, with that -- for those of you in the audience, I would anticipate being in Executive Session for approximately 30 minutes or 40, counting the tenminute break and we will convene in Open Session after that. With that, we are adjourned from the public meeting and we are in Executive Session in ten minutes. Thank.

Whereupon, the Public Meeting was adjourned at 1:25 p.m.

MR. VANDERGRIFF: It is approximately 2:50 p.m. on May 13, 2010, and the Board of the Texas Department of Motor Vehicles is now in Open Session. We want to note that no action was taken in Closed Session and so, with that, we're moving forward back to the top of our agenda. We've got briefings with respect to Administrative Updates.

We do want to note, I guess briefly, from the Chair, a couple of things that I think are of note for you is we obviously continue to meet, as requested, with stakeholders and people in the industry, the tax assessor-collectors continue to out-request, out-attend,



outperform the entire industry. In fact, the rest of you are lapped about 17 times over by their very aggressive efforts to tie up -- the Executive Director and I have been to a lot of great, exotic places across the state of Texas in the last month as we visited Tax Accessor—Collectors and do want to note, without noting where, we've had some great comments.

We were directed to -- when you call in to VTR or to the DVM, you need to press one for English, press 2 for Spanish and be able to press 3 for hillbilly. So, we have some that feel like that our communications are a little too dense to understand and we have others who want more so it's been a great experience. I love the Tax Assessor-Collectors and I mean that surely.

I issue a challenge to the rest of the industry -- those of you who are still here -- to continue to invite us and get us to participate as effectually with you as they certainly do with us.

The other thing -- it's not published yet but I do want to note that it's late but anyone who would like one of these will certainly be on our website but as a quarterly report to the Governor and it has been distributed to the Board and I did not know if any of the Board members here in Public Session would like to make any comments or suggestions to it.



I did not -- have not had anybody ask me anything but I wanted to give everybody the opportunity. I do want to note so that you do understand that we have not voted on these in session. We've just kind of discussed them as appropriate and I think we will move forward with something as the organization of the agency proceeds but we are very much wanting to clearly delineate goals and objectives for the agency, improve and enhance customer service at the Department of Motor Vehicles, streamline the operations of the agency and deliver a better value and return on investment and then operate in a transparent and open matter. And that's in this report, as well as other details and certainly, within the next couple of days, that will be on the website and available to that. And with that, I'll move into Item 2.A.2, which is Central Administration and turn it over to Mr. Serna.

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MR. SERNA: Thank you, Mr. Chairman. I'll call up Dawn and Linda to very quickly go over the fiscal update and administrative update. While they're doing that, let me take you real quickly, if you don't mind, to Personal Postings and Hiring. All I want to do is make sure that everybody realizes this -- I would have said it earlier had we kind of followed the normal flow, but I have selected Brett Bray as our General Counsel.



I have appointed him to that position. It's effective -- it was effective Monday. That's why he's performing in that role. In addition, we've hired Deborah Giles as our Government Relations and Regulated Industry Liaison and Julie Beisert -- did I say that right, Julie? -- Beisert, as our Program Coordinator Researcher, to support the Board. Julie's sitting right there.

Also, I'm with some regret, announce that
Rebecca Davio is resigning her position as Director of
Vehicle Titles and Registration. She'll be going on to
quite literally bigger things; a bigger division, at the
Department of Public Safety over their Driver's License
Division. Her last day will be May 21 in her office.
Her last day on our payroll will be May 31. She's going
to take some well-deserved time off and she'll start over
there June 1. In the interim, I intend to appoint Mike
Craig, who's currently her deputy as the Interim Division
Director. And that will be effective May 24th so that
checks off Item Number 3. And now, with that, I'll hand
it off to either Linda or Dawn. Linda, our new CFO.

MS. FLORES: For the record, my name is Linda Flores. I'm the Chief Financial Officer for the Department of Motor Vehicles and today I'm going to go over a couple of things with you. A list of upcoming



projects and also our expenditures that we've incurred here today. And Julie's passing out the timeline and the document with our budget and expenditures.

Some of you may have already seen this material as it was shared with the Finance and Audit subcommittee yesterday. The first document I'd like to refer to is the timeline for upcoming projects. The agency has various tasks ahead of it between now and August. We are putting together an operating budget for the department that begins fiscal year eleven that starts September 1.

That will also feed into all the tasks associated with a strategic plan and a legislative appropriations request so this timeline kind of frames out the different components of all of the projects this summer.

The LAR is on page 2 of that document and I've provided just a summary of all the forms and reports that go into an agency's appropriations request and I've brought some props just to kind of show you all what an agency's appropriations request looks like and this is an old TxDOT appropriations request and it's very similar to an appropriations request from the Commission on Environmental Quality, as far as depth.

And the agency's strategic plan, which is the beginning of those appropriations request, is due to oversight agencies July 2.

MR. SERNA: Linda, I'm sorry to interrupt you.

Let me ask you. I know TxDOT's annual budget is about

seven to \$8 billion dollars. What's TCEQ's annual

budget, roughly.

MS. FLORES: This one represents approximately a billion for a two-year cycle.

MR. SERNA: So about \$500 million a year?

MS. FLORES: Yes, sir.

MR. SERNA: And the reason I wanted to mention that, Board members, is, our annual budget's about 150 to \$160 million dollars. One billion, you get a document that looks like that. Seven to eight billion, you get a document that looks about the same. Ours is not going to be that much smaller. It may be a little bit smaller than those documents but the point is, there's just a lot of forms that Linda and her future staff are going to be -- Dawn are going to be filling out. Right now, Linda is the staff. Dawn is the staff that are going to be filling out. And that's the only reason I wanted to kind of give you a frame of reference that it's thickness driven just by the dollars, it's just driven by the fact

that there's some bureaucracy associated with developing one of those things.

MS. FLORES: With all the various forms, it's really the same information but it's regurgitated in different ways and different formats so I would concur with your assessment and this is the agency -- is the strategic plan and this is where we don't have a lot of time but this is where the Board can really make an impact us to the agency's vision for the next five years. With that, I'll turn over the report of review of the agency's budget and expenditures. Again, some of you have already heard this.

Page one of the overview provides expenditures through April. We've recorded approximately \$69.6 million. Sixty-seven percent of the year has lapsed. We have remaining available budget of approximately \$111.1 million dollars.

I would like to mention for the Board members that, out of that \$111 million, \$30 million has been obligated for Vision 21 and another 3.7 for the insurance, Texas Sure Program. So, even though that does look like a lot of money, some of those dollars are dedicated.

And, you'll notice as the months go by, expenditures are increasing and so some of that is just a



into the habit of spending their dollars. 2 The Meyer Settlement, you will see, was spent 3 in November. That's what that \$22 million and other 4 5 operating expenses is all about and it's my understanding that we're about to post another \$2 million. Oh, I'm 6 7 sorry, it's in the April account. The month of April. Another \$2 million for the attorney fees is reflected 8 there as well. 9 10 And really, the second page of that document is 11 just -- it's the same information reflected in a different manner. It's by division. And I did receive 12 13 some feedback yesterday from the subcommittee with 14 regards to what kinds of template they would like to see in the future so I'll be working on that as we go along. 15 16 I'd be happy to answer any questions. 17 MR. VANDERGRIFF: Seeing none, thank you very much. 18 MR. CAMPBELL: Well, one question. 19 20 MR. VANDERGRIFF: Never mind. MR. CAMPBELL: If you'd explain the utilities 21 22 in the month of February. I didn't --23 MS. HEIKKILA: That was -- there was a one-time payment required by the Memorandum of Understanding. 24 25 Those were a portion of the funds -- the program funds

reflection of wrapping up our staffing and people getting

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that TxDOT would have allocated to their technology service division and their maintenance division for the payment of those utilities and there was an agreement in the Memorandum of Understanding that on February 1 -- on or about February 1 the DMV would transfer a lump sum payment for the portion that the transferring divisions would have been responsible for, had they stayed in TxDOT and because we're still located in the TxDOT facilities, there's an assumption that we're going to continue to pay our share. Does that answer your question? Okay.

MR. VANDERGRIFF: Any questions? Fine. Thank you very much.

MS. HEIKKILA: As far as Administration, we're working on our re-org.

MR. SERNA: That's it?

MS. FLORES: That's about it.

MR. SERNA: Thank you.

MR. VANDERGRIFF: Okay. Thank you. We've already covered the personnel postings, which is 2.A.3 and 2.A.4, Board Committee reports. Just in general, I do want to note that a couple of committees met yesterday, encompassing about four hours of work of very detailed and I think very productive work, which you'll see the benefit of here shortly in some of the action items but very much appreciate that effort and for those



of you who have not had the pleasure of running the gauntlet of Johnny Walker's committee, I only hope you have the pleasure of that some time in the near future because he definitely -- his people ask all the questions, as does Mr. Campbell's, as well.

So, I appreciate that very much, the efforts they have. With that, I know that we did not have an Administrative Committee so I won't -- unless Janet has anything she'd like to add. And Ms. Johnson is gone -- had to leave the meeting; her son is graduating from Texas A&M. She needed to get down to participate in that and we're thankful for the graduation. She feels liberated; one down, one to go, she said.

But, she had to had to leave us and we did not have a Legislative & Public Affairs Committee meeting.

We did have a Finance & Audit and a Projects & Operations and I guess in the order they're presented here, I'd ask Mr. Campbell to tell us about the Finance & Audit Committee.

MR. CAMPBELL: We met yesterday, had a full -in attendance -- let's see, no, I'm sorry. Janet wasn't
there, that's right. And we had other members, Chairman
and Vice-Chairman in attendance.

We basically went over some of the reports there and some of the timelines also, strategic planning



and -- but, overall, was pretty good and I think we'll discuss it in among you here in just a minute, if we could.

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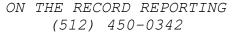
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MR. VANDERGRIFF: All right. And, all kidding aside, Mr. Walker, do you have updates for us?

MR. WALKER: I do. I was real excited this morning and had a long report to give to you but in lieu of where we're at today, I'm sure that's why you put me at the end of the program. There's a brief in it -- no, we had an extremely productive meeting yesterday. And we had a full house; all of our Committee was there and we covered lots of items since I have been given a lot of items on my committee and I will just start with the first one here and we talked about Vision-21 and Ed made a report to us yesterday that the Vision-21 focus is going to be a little more broadly focused throughout the department instead of just being a variated VTR, we're going to expand that to be a department-wide vision that we're going to look at totally re-vamping the technological and the aspects of how the department is run, from, I think, a technological standpoint and that we are going to stand up a committee before the next Board meeting of a group of people within the DMV that are going to take and be able to progress this, look at what our needs are going to be within the department and





identify the needs and then progress that forward into an actual implementation of the Vision-21.

We hope to have the full program implemented and in place by the year 2015 -- am I not right, Mr. Serna?

MR. SERNA: Yes, sir. That's the absolute outside date.

MR. WALKER: The absolute outside date. So that kind of summarizes where we went on the Vision-21. Then we talked to My Plates and addressed the My Plate program here and looked at the implications of that program and learned a whole lot about it yesterday that we probably had never been real versed on, prior to this point in time.

So we have a very good understanding today of the My Plate program. It is run by a company called License Plates of Texas. They are the exclusive and the sole provider of license plates, personalized and speciality license plates for the state of Texas.

They have a \$25 million guarantee to the state over a five-year period of time and, of course, we're concerned about making sure that the state is remunerated for the \$25 million over the period of time so we wanted to make sure that the viability of the License Plates of Texas people will be able to meet their goals.



The committee has asked that they provide the department with a copy of the financial statements of the two guaranters and there are two guarantees of the \$25 million, which I can't remember both their names of those two companies but there are two individual guaranters in companies guaranteeing the \$25 million, plus we have asked for the financial statements to look at how, after

six months, the program is going for the My Plate people.

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The sales currently on My Plate program, they have a shortfall, if you were to amortize the \$25 million over a five or six-month period of time, we have a shortfall currently of about \$1.6 million dollars in where we should be if it were perfectly amortized over a period of time. However, Steve Ferrar [phonetic] assured the state and I take it for granted that he is telling the truth and that his projections are correct is that we're in infancy stages of the program -- we're six months into the program and, as with any start-up, there's going to be less revenue coming in in the front end of those programs; however, it is something that we, as a committee and as a department, need to always be aware of and look at that the program is progressive and moving along at where it needs to be and we have also asked them to provide us with some budget estimates as to



where and what times where the program should be, with respect to sales.

As of yesterday, the My Plate people had sold their 13,000th plate to citizens of the state of Texas and I believe that the state's portion of that is around \$900,000 -- I believe at this time is where we are at in the game.

Let's see here. The My Plate people are also planning on their first auctions and they gave us some pictures of -- there's about -- I want to say there's 12 plates that the My Plate people are going to set up for auctions. They're some exciting plates in there.

There's a Texas -- hook-em, I think is in there. I think Texas Aggies are in there, Texas Aggie, I think -- Cowboys in there.

Jim, do you think any of the other ones -there's like about 12 of them that I think have some
potential there that we can go out and will create a huge
amount of money maybe for the state of Texas. We hope so
and we can only expect on those things.

The next area that we covered, we covered the specialty plates section and the committee is going to make the recommendation there is that -- we looked over the -- at this time the -- there is an advisory committee that advises the plate manufacturer -- I shouldn't say



that -- we are the Department of Motor Vehicles, as to how we progress those programs and approves the plates that will be progressed to go onto the back of cars and what we would like to do right now is we're going to submit a resolution to the Board for approval and that recommendation is that the entire Board, based on information that we have come to attention since April 23, publication of the proposed Rule 217.28 in the <u>Texas Register</u> that would modify the proposed language such that the department staff shall present all specialty plate design applications and staff recommendations to the full Board for its consideration.

So, in essence, what we're asking for is that instead of relying upon a committee of our employees to make those decisions solely on their own is that we think that it needs to come before the full Board when we look at the terminations of those plates.

An obvious question might be, Well, how often do we need to do this? When I asked that question, I think Rebecca told me that it's about -- roughly about -- there's about eight or ten designs that come before us with specialty plate section in order to be approved so it's not like its something that we're going to have to be up here every month doing, or every week to approve.



1	So I'm going to wrap it up and sent it to
2	Rebecca?
3	MR. SERNA: Just giving hand signals.
4	MR. WALKER: I know when I'm speaking of
5	someone with her expertise I should be looking at her,
6	because she's either like this or like this always.
7	MR. SERNA: And it also includes the My Plates
8	designs so, which is about 50?
9	MR. WALKER: Yes.
10	MR. SERNA: I can read hand signals.
11	(Simultaneous discussion.)
12	MR. SERNA: About 50 or 60 a year.
13	MR. WALKER: So, anyway, that is the and I
14	have a proposed resolution here that we would like to
15	take and do I need to
16	MR. VANDERGRIFF: Would you like to read that
17	resolution? We can take that up.
18	MR. WALKER: Right now, at this point in the
19	meeting?
20	MR. VANDERGRIFF: Is it going to be a motion?
21	It's a natural motion though, right?
22	MR. SERNA: I guess that we need to make it a
23	motion.
24	MR. WALKER: I will make a motion, coming from
25	our committee, that the following resolution be accepted:
	01, 717, 77,077, 77,077



It is therefore ordered by the Board -- let's see -that the Texas Board of Motor Vehicles has considered the
agency's need to appoint advisory committees and the
provisions of Transportation Code, Chapters 1001 through
1005 and Government Code Section, Chapter 21.10, it is
therefore ordered by the Board that the agency's
Executive Director is authorized to convene committees,
including advisory committees authorized by the --

MR. SERNA: You're on the wrong one.

MR. WALKER: Am I on the wrong one?

MR. SERNA: Yes, you are.

MR. WALKER: Sorry about that. I'd like to make a recommendation then -- a proposal -- that the Committee recommend that the entire Board, based upon information that has come to its attention since the April 23 publication of proposed rules, Section 217.28 of the Texas -- that it modify the proposed language such that the departmental staff shall present all specialty place design applications and staff recommendations to the full Board for consideration.

MR. CAMPBELL: I second.

MR. VANDERGRIFF: We have a second from Member Campbell. Do we have any further discussion on it? All right. With that, I'd ask you to raise your right hand in support of the motion.



The motion carries with those present unanimously; Members Johnson and Rodriguez are absent.

MR. WALKER: Okay. Then, we addressed the Advisory Committee issues that are mandated by the law and after looking over this, what we would like to do here is that the Committee recommends that advisory committees convene only as necessary. By law, there are three standing committees — advisory committees; one VTR, one Motor Carrier and one — the MD — let's see, which one am I missing? MDV.

So, what we would like to do there is that instead of appointing these advisory committees with a certain designated group of people, is that the department will take and create a bucket -- I'm sorry, let me back up just a minute -- is that the Director, Ed, is going to go out and publish or proposed positions for the Advisory Committees and that we will draw a pool of people and that there's a maximum number of people on these committees, I believe, of 26 was it? Twenty-4. Twenty-4 people and that we create a bucket and that we can draw from, for each particular issue, as we need advisory committee meetings, we can go in there and pull that committee and activate them, go to the pool and pull out eight people or ten people, whatever we might need,

in order to take and progress a particular issue that 1 might be before the department at that time. 2 So, I'm going to make another --3 Yes, sir, Mr. Vandergriff. 4 5 MR. VANDERGRIFF: No, I was going to ask before 6 you make a motion, I would like to do an unusual step of asking for some industry comment. We have one request to 7 make a comment on the advisory committees I'd like to do 8 9 before you make --10 MR. WALKER: Before I make the motion. 11 MR. VANDERGRIFF: -- the motion. Now, if you 12 have further comment on the activity on that point, by 13 all means go forward but if you're ready to make the motion --14 MR. WALKER: I'm ready to make the motion so 15 16 why don't we just pool the public comment right now, then. 17 MR. VANDERGRIFF: I'd like to do that. Let me 18 introduce this, Ed. I'd like to ask Ken Roche, who's the 19 Vice President of Governmental Relations and General 20 Counsel for Gulf States Toyota to come up. By way of 21 22 introduction, he can certainly introduce himself, but I 23 do want to say, Mr. Roche, I had the distinguished pleasure and privilege of serving with him. He was the 24



manufacturer representative on the work group inside of

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TxDOT that their report, as you all know, led to the 1 2 creation of this agency or was a building block to that and Mr. Roche was very instrumental and very supportive 3 of that process, all the way through and was really the 4 5 instrumental person in the discussions with respect to advisory committees and he, after the meeting yesterday, 6 7 made a couple of points to me that I felt were very 8 appropriate and encouraged him and he was agreeable to 9 come and have that discussion with all of you. 10 So, with that --11 MR. ROCHE: Thank you, Mr. Chairman. MR. GILLMAN: Mr. Chairman, Mr. Roche. 12 13 MR. VANDERGRIFF: Yes, sir.

MR. GILLMAN: I know who you are. I've been around you a couple of times and respect you very much. Please take no offense. I've got to leave. Thank you, sir.

MR. ROCHE: No problem.

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MR. VANDERGRIFF: Do recognize that with Ramsay leaving, no one else gets out of the room. The doors are locked because we're down to five.

MR. WALKER: Six. It shows six.

MR. VANDERGRIFF: Okay, I'm sorry.

MR. WALKER: We're still okay.



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MR. VANDERGRIFF: So one of you can race through if you want. I can draw straws if somebody tries to leave early. Thank you, Mr. Gillman.

MR. ROCHE: Thank you, Mr. Chairman, Members.

Thank you for the opportunity to give you some feedback in terms of the history of the discussions related to the Advisory Committees and at least some of the industry's thoughts and expectations about what might be helpful to the new agency and the divisions.

So, bear with me. I'll try to give you a little history and then some reflections on some of the comments that came up yesterday and at least to give you some perspective that we, in my side of the industry, have.

The Chairman noted that I participated in the study group, representing the manufacturers and during that five, six-month period, the advisory committee concept came up several different times and I would, in a brief manner, try to give you a reflection of what I thought was the input from different members of that committee.

From a staff standpoint, my memory is that they all agreed that advisory committees could be a very helpful tool. They were all expressing, in good faith, reservations about being -- my word -- saddled with the



burden of having an ongoing committee because of time and whether it could really be a help, instead of more burden.

Those in the industry, and I probably was the more ardent of the advocates for it, was that recognizing the committees of a legislature -- and that proved to be the case when we got into the session, when this got approved for the agency to be pulled out, that there was this sense of TxDOT in a culture that was in legislators' mind, some or many, was broken, perhaps particularly as it applied to these four divisions.

And our study, in fact, supported the notion that these four divisions that have been pulled out of TxDOT to make this new agency, really had a customer service focus that was necessary and that that was a critical view for the future, both for the Board to be now and presence and for the staff to work towards.

Those of us in the industry felt like an advisory committee with industry participation on an ongoing basis would provide the customers, the public, the carriers, dealers, manufacturers, and we would be providing input and insights into how things were affecting us and that that would be really a catalyst for an examination of the agencies and the divisions' goal setting, for how do you focus on customer service if



you're not actively involved in receiving input from those customers, on this plan, this strategy, the overall goals and that we could provide help in that regard.

So that was kind of a key plank that we thought made a big difference. In the legislature, when the bill came up, I testified on behalf of Gulf States and the Alliance of Automotive Manufacturers and advocated strongly that the legislature include the advisory committees in the final package, for some of the reasons that I've already described.

I'll turn now to just a couple of questions
that came up yesterday and to give you perspective and
this isn't shooting it down. This is simply trying to
give a different angle for you to consider. One of the
descriptions was, Well, we know they require the advisory
committees but we didn't have the Board and now we've got
the Board -- and while I'm paraphrasing and adding -- the
Board represents all of the customers and what I'd
suggest would be helpful for you to consider is that your
role as the Board at an over -- an umbrella that oversees
the agency and its performance and a policy setting body
that the kinds of issues that we thought we were
targeting for an advisory committee are in the weeds.
They're operational; they're process. How does each
department touch the public? How does each department



touch a licensee? And those are functions and day-to-day kinds of interaction that you, as a Board, are not likely to have the time to be able to deal with nor, if your policy is your primary policy, would you want to get into that kind of detail because it's more day-to-day.

So our thought was then that an advisory committee structure would provide that input at that functional, day-to-day level. Just to give -- that was one point. Another point was that, in terms of -- there are three committees that are required by the statute yet things are changing, things are adjusting and I've talked to Mr. Serna. It's been an old discussion but we've just agreed we needed to get back together so -- and that's my fault for not doing it sooner but those kinds of adjustments I think you can do on the run.

We've talked about, perhaps, there's a group -small group -- that could be a resource for the staff to
examine how this could best work so that not in a vacuum
but it terms of those people that you're trying to engage
in the dialogue that we would be willing to participate
in that study, that developmental structuring.

A couple of things that we in my industry are doing. GST is a private distributor in Houston. We're the only company in our group that really is headquartered in Texas. So, one of my roles has been to



coordinate with the Alliance of Automotive Manufacturers and the Association of International Automobile

Manufacturers to alert them that there is an opportunity that we've never had in Texas and that's to engage proactively in how to improve processes and make things work better and we're good at defense. We do very little proactive. But I've been selling this for a year and a half that there's an active, participation that we're going to be invited to. So, I just give you that as a long-standing effort on our part to create an interest.

Likewise, I've met with Rob Braziel, of Texas
Auto Dealers Association six times this year and one of
the primary subjects of our meetings, each of those six
times, has been how were the dealers and the
manufacturers going to put aside what is our norm in the
past and that's been adversarial issues and how we are
going to shoulder-to-shoulder jointly provide this agency
with proactive input from the industry with a consensus
between us about what's important so that we're not
arguing in front of you but really have a joint approach
to this.

So I tell you that so that you understand, we've actually been trying to do some spade work to get ready. As I've told Mr. Serna, Rob and I met with Ed I think the week after he was appointed and we very



intentionally didn't meet with him separately. We wanted him to see that the dealers and the manufacturers were intentionally coming to him to offer our joint approach to this.

So we think that's a meaningful step for us in our industry to do that. The dialogue that we've had and the study group from the carriers, from the county tax collectors, from the independent car dealers were consistent with that approach.

So we'd like to advocate to you that we think this work is really in the weeds, it's the processes, it's how the agency and the industry makes sure the public is getting served and we've got a responsibility to respond to that and not just leave it to you.

So, with that, I'd like to leave with the idea that we would be disappointed if there wasn't some functional component that was an ongoing dialogue. Maybe it's of the planning, maybe it's of the picking the subjects or something but I would suggest to you and hope that you would consider some hybrid from the things you reviewed in your committee yesterday. These are some new factors I think you may not have heard before but we think they're an important ingredient for us as an industry and an agency to really make this work. And now's the time to do that, not three years from now.



We'd like to help you create that environment and that culture. So with that, I would answer any questions and thank you for the chance to speak to you.

MR. WALKER: Mr. Roche.

MR. ROCHE: Yes, sir.

MR. WALKER: There were some extremely good comments and I appreciate those and I wish that we had heard those probably prior to our meeting yesterday. I don't think that the approach that we're going to take is going to preclude anything that you've asked for, however.

And let me tell you a little bit about some of our thought-process and where we ended up at today is that we were concerned, somewhat, with if we stood up a committee on car dealers, let's just say, that or -- I guess we have three committees. Let's just make it the Motor Carrier system, trucking company. That if we set that up and we assigned ten people to that that are in the trucking business or have some kind of interest with the trucking industry, so to speak, that if there's not any issues, then the committee people would have this sense of, well, I was asked and it was an honor that, yes, I've been to asked to be an advisory committee and they're going to go out there to participate and then nobody ever asks them to do anything and it's like, Well,



he asked me to do something but there wasn't any need --

MR. ROCHE: They gave me no chore to --

MR. WALKER: There wasn't any need for it. So, when you don't have -- it's kind of like in my business, how the trucking industry is, we're common -- we have the best common bond when there's an issue addressing us so we all have to come together and sit down but outside, if there's not an issue affecting our industry, we all tend to run our own companies and say, Everything's fine and not to do that.

Well, with the way we have proposed to do this,

I think we can do what you want to do and I will sure
take it to note is that instead of having the Motor

Carrier committee, which we will still have, we will have
a group of people, a bucket of people of which we would
love for you to be on that advisory committee or other
people throughout all segments of the industry, whether
it's consumers or motor carriers or car dealers or
manufacturers or distributor. We want a broad group
spectrum and there's going to be a time when we take that
and need to have an issue in the vehicle business where
we might want to take, instead of just pulling from the
vehicle pool over here, we have the ability to pull out
of the same bucket where there's somebody else who's very



active, who's very knowledgeable that we can take and make that active and put him onto that particular committee instead. All the committees will still exist as the legislation requires but we're just not going to appoint directly individual people to those committees. We want to have an eclectic bucket, so to speak

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And, what you have asked that I think maybe we haven't addressed is that -- and you make some excellent points there and I'd be first to commend you on it -- is that we want -- and I promise you this Board -- I've served on it now for I quess five months. It is a very, very open Board. It is a Board made up of -- all of us are affected by this Board and the things that we do through our industries, myself through trucking and other people through car dealerships and the manufacturers. We're all represented so we feel like we have the ability to reach out to all segments of the industry and so -but, yes, there's issues out there that we would love to have your comments and those committees are an excellent place to do that and maybe in our mechanism my proposal is not going to preclude anything that you've asked for. I promise you that. All we want to do is just stand up. The pool of buckets of people is all we're going to do but we will take your recommendation that maybe we need to meet more often instead of less often to just have a



created using **BCL** easyPDF **Printer Driver**  public comment from the industry that says, What are the issues out there and what would you like us to direct that to. If I do that, will that satisfy what you think we need to do?

MR. ROCHE: I'm not troubled by the way you're trying to manage the expectations and the difficulties of biting into the apple and are you going to get enough nutrition from that type of thing. And, you got to adjust to that and we're okay with that.

But I just wanted to come speak to you to give you these other perspectives so that, moving forward, you could at least know that there are those and that's up to us as an industry to step up and actually participate and I've committed to the Chairman and Executive Director that I'd be applying to do that and we have others that are ready to do that, as well.

My group of companies has a unique role. We have a trucking company.

MR. WALKER: I know you do.

MR. ROCHE: We are a dealer, Lexus dealer as well plus we're the distributor so I've plenty of buckets to play in with an interest and there are others that are ready to do that. We've been working at that. And our partnership with the dealers, I think, is a uniquely new effort to engage and I think we can fit our interest into

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a structure and we will make sure that you hear from us 1 2 regularly for input. MR. VANDERGRIFF: Anybody else have any 3 comments or questions of Mr. Roche? 4 MS. MARZETT: Well, just a comment. I mean, I 5 think it just makes sense that we could leverage, you 6 know, the collective issues proactively so that we're not 7 8 having this fragmented and kind of isolated approach so 9 it definitely makes sense to try to make sure that we can 10 lavish this expertise, particularly that you're so 11 interested in others to give. So, I'm not sure that I completely understand and maybe you can walk me through a 12 13 little bit of the process of how we're going to do the committees because I'd like to make sure that we 14 incorporate that. 15 16 MR. ROCHE: Thank you. MR. VANDERGRIFF: Any other questions? 17 18 MR. ROCHE: Thank you for the opportunity. MR. VANDERGRIFF: Appreciate it. Johnny, maybe 19 20 you ought to announce --21 MR. WALKER: I'm sorry, go ahead. 22 MR. VANDERGRIFF: Maybe you ought to give the 23 recommendation and then we can discuss that 24 recommendation, if there's a way to tweak it or the 25 desire to tweak it.



1	MR. WALKER: I'm going to can I
2	MR. VANDERGRIFF: You can change it.
3	MR. WALKER: I don't know what I want to say.
4	Wait a minute.
5	(Simultaneous discussion.)
6	MR. WALKER: I can't change it.
7	MR. VANDERGRIFF: No, because your committee
8	brought it forth.
9	MR. WALKER: I can't change it because the
10	committee's already it brought it forth.
11	MR. VANDERGRIFF: But the Board
12	MR. WALKER: The Board can change the
13	recommendation. So let me present the recommended
14	proposal to the Board and the committee's recommendation
15	was that the Committee recommend that the advisory
16	committees be convened only as necessary. We further
17	recommend that the Executive Director collect the names
18	of potential advisory committee members and create
19	committees as needed. And that should be wrong. That is
20	not create, it's convene. It shouldn't be create, it's
21	convene; convene committees as needed.
22	That is the recommendation of the committee. I
23	would like to make
24	MR. VANDERGRIFF: Johnny, go ahead and make the
25	recommendation the change.



1	MR. WALKER: Are you you want to make the
2	motion and then
3	MR. VANDERGRIFF: I'd like to make the motion
4	but then I need a second, I guess, and then we can
5	MR. BUTLER: I'll second.
6	MR. VANDERGRIFF: Okay. Now we discuss.
7	SPEAKER: Mr. Butler's second.
8	MR. VANDERGRIFF: And I now we have the
9	discussion. Janet, you want to go first?
LO	MS. MARZETT: Well, I think just what the
L1	wording. When I think initially you described it only
L2	if necessary. And that, then, kind of doesn't capture
L3	what we want to do proactively with really hearing some
L4	of the issues up front before we really were more
L5	reactive.
L6	MR. WALKER: I agree with you. That was the
L7	comment I was going to make and my recommendation would
L8	be, I think, the same thing she's going to make is that
L9	we change the wording that "convene only as necessary"
20	to maybe we could change that so that the
21	MR. VANDERGRIFF: It's proactive as needed
22	MR. WALKER: It's proactively as required or as
23	needed.
24	MR. VANDERGRIFF: Would that address the
25	industry's



MR. WALKER: Address the industry's issues --1 MR. VANDERGRIFF: And customer focus of the 2 3 agency. MR. WALKER: And I think, Ed, that a good thing 4 5 to do might be -- without having to put this into writing but maybe just periodically, maybe quarterly or bi-6 7 annually maybe, that we convene those advisory committees 8 in order to sit down and ask the industry what they would like to see changed or what issues they see within their 9 industry that this Board needs to address. 10 11

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MR. VANDERGRIFF: Well, perhaps even a discussion item if these -- if you did that on a regular basis, it's just a reach out to the industry so that you -- the Executive Director particularly and then to the Board have that input from them so that they have a forum in which to bring up issues, that they know that these issues are going to be addressed.

MR. WALKER: And I truly believe that the legislators, when they created that requirement, that that's what they were trying to do was to say, Hey, we need a mechanism that the rest of the world can come in and make a comment and make changes, for the betterment of the industry and for the state.

MR. VANDERGRIFF: I still think it's appropriate that they have a purpose when you meet --

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1 MR. WALKER: Yes.

MR. VANDERGRIFF: -- but yet they can also be polled, if you will, or asked for opinions about -- on a regular basis about things they might be seeing that -- doubled up, it ought to be considered. And then the Executive Director and/or the Board, as appropriate, can make --

MR. WALKER: Ken, what would your recommendation be as to how often would you like to see the committees sit down amongst themselves and say, These are the things that we think need to be addressed?

MR. ROCHE: I think if you recognize that when you're starting this agency and we're starting this engagement that we would meet more often than we expect to meet a year or two down the road so I expect it's going to be more often early to get our feet settled. I mean, we've got to organize, we've got to talk about process of how we're going to work.

So I think some of that organizational activity is actually more regular then but I think then it depends on your subjects and your goals and the significance of the issues. I mean, if you put a subcommittee together, Ed, and I have talked bout subcommittees that have a particular topical project. That committee might meet



regularly for several months because really you're 1 2 attacking a project. So the flexibility and if it's the Executive 3 Director engaging committees in a regular process that 4 5 addresses the needs and goals of both the agency and the industry, then I think you're beginning to have an 6 adjustable flow -- a judgmental kind of schedule and if 7 you're taking the agency and the industry and the public 8 9 into account, in terms of needs, everybody's got some 10 input to say we need to do this one or it gets to be 11 regular -- then quarterly might be just fine. Does that help? 12 13 MR. RODRIGUEZ: Do we have a number we're going 14 to put on that? Number of people? 15 MR. VANDERGRIFF: No, advisory committees can have up to a maximum of 24 but that would be unworkable. 16 I think the idea if -- and the Chair can -- or Members, 17 18 you were there as well -- I think the idea was just to have a pool of folks --19 MR. RODRIGUEZ: To draw from. 20 21 MR. VANDERGRIFF: Yes. 22 MR. ROCHE: And I'm not troubled by that 23 concept at all. 24 MR. RODRIGUEZ: That's a better concept than



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the --

MR. VANDERGRIFF: It is. It is because at least you're picking your assets and availability of people at particular times. If somebody can't do something because they've got a particular project at work, then they're not up for two months for the next assignment kind of thing.

I do want to note in that regard for the benefit of the agency as a whole that there may be -- you may have a perfectly great pool of people but you come up with an issue that doesn't necessarily fit that pool. I can't tell you what that issue would be today but they always come up and so I think that you do have to have some flexibility that the Executive Director could go outside of the pool to get the right people to address a certain issue.

You know, I harken this as an example is that I would not want a bunch of car dealers -- no offense to any of us -- from past life and current -- to be in there talking about in the weeds on title and registration issues. We'd be the last people in the world should be in the room. But perhaps our title clerks should be.

You know, that type of thing.

So, it -- I think you have to be careful. That might not be somebody that's on a standing pool but would be appropriate.

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MR. ROCHE: You can also talk about resource appointments.

MR. VANDERGRIFF: Yes.

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MR. ROCHE: I mean, you're talking about expertise appointment, ad hoc.

MR. WALKER: This maybe kind of puts us back a month but do you think that perhaps this one might ought to have a little further thought-process with the Executive Director and then come back in June with the real specific --

MR. VANDERGRIFF: If you want to propose it and we'll vote for it then that's fine but --

MR. WALKER: Well, I'm okay with making a proposal but I'm missing a couple of words and I just don't know how to fill in those -- I want to meet Ken's approach here. I think there's a very definite need for what he's asking for and I think it's almost a directive from the legislation as that's why it was created. And so, I think we want to meet both the legislative and the public's needs there so -- but then again, I know why we did what we did because of concerns but let me give you a great example is that another part of the legislation requires that when we stood up this agency was that we go

out and have town meetings all around the state. Is that not correct?

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And so -- and tell everybody what we were going to do and how we were going to do it and we went out there and there would be two people show up, there would be one person show up or nobody show up and we realized we were spending a bunch of the state's money and people's valuable time and when we looked at who the people were that showed up, they were our own people from our own department.

So, we -- at that point in time, we just said, Hey, you know, this is a waste of our time. It was a good intention but it's really not what -- and we didn't want to get into the same situation down here where we stood up committees and put a bunch of people and asked 25 people to be on a committee and then never call them up and then it was like, Well, why did you ask me to something but you didn't need me.

But, I'll agree with you that there is particular need but how do we say, When is that need and how often should we draw that? Now, I'm not sure I will agree with you totally on that we need to be stood up a whole bunch right now, that we need to be meeting monthly because this Board meets monthly and it's a lot of work.



So, I'm not sure --

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 $$\operatorname{MR.}$  ROCHE: I understand the dilemma. The pragmatism has to be part of it. We understand that. I quess I --

MR. WALKER: I'm really not sure of -- I'm missing where "only as necessary" is what we have put here and how do we address those three words.

MR. SERNA: I'm thinking -- you know Brett's much better with words than I am but I think what we can do is, you can leave the "as necessary," if you put an "and" in front of it and what we will do is establish at least one or more standing advisory committees to address industry and agency operational issues to say, Blah, blah, blah to establish one or more standing advisory committees to address industry --

MR. WALKER: Was three required?

MR. SERNA: Well, then this is why I'm getting to the -- the way you get to the three is, you establish these one or more standing advisory committees to address industry or agency operational issues "and" other advisory committees, as necessary, so you're going to end up getting more than just three. And it'll be -- I think we can still get to where what we're doing is on really key issues, and we've got some coming up. You know, we



talked earlier today in this Board meeting about the issues concerning "good faith effort" and that kind of stuff and we talked about some of the other issues that pop up but I think -- and I've had just a few conversations with Ken -- but I think there's a need for sort of an overriding committee that advises the Executive Director, that advises the Board on issues concerning, you know, or on critical issues that involve the agency.

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And those could be topical issues that are statutory or procedural or business in nature. They could be issues on policy. They could be policies on Vision-21 and some of those operational changes that we talked about yesterday.

But with the standing committee -- these standing committee could also, in my opinion, then drive what needs to occur in the form of either a subcommittee or an ad hoc advisory committee that we talked about yesterday.

I think we can kind of get there with just a minor modification of that and the instruction to the staff that we work with industry to set up what's necessary.



MR. VANDERGRIFF: I think Mr. Serna has an excellent suggestion. I might throw a little modification to that that might make sense in terms of the potential of at least a temporary, lets-move-itforward solution is, there were -- and I don't even know where they all are, at this point, in terms of their interest in serving and one of them is sitting right here and so he may have said, This is not my intent to volunteer myself but perhaps what might be appropriate for the Executive Director to re-contact the members that served on that work group that are -- I was on it but I'd be excluded from that -- but from -- that were part of the industry, because all of the industry that we had -have reflected there and ask them to provide some feedback and commentary based on their experience as to how to structure this in an ongoing support role while still preserving the ad hoc nature, which we discussed yesterday in your -- that you alluded to today. Is that maybe something that might fit because that would be a very small group of half a dozen or so folks that, I think, would be good to hear from and might provide a year or plus later some good feedback.

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MR. WALKER: But don't you think that we need to move forward on the issue?

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MR. VANDERGRIFF: This would do that. This would do that. This would address the issue of somebody, in coming back to this Board, coming back to the Executive Director, having input of what the ongoing function and really, to me, what better group than the ones that were actually there that asked to create the ongoing function and then -- yet still preserving the ad hoc nature because I do think that rifle shooting on specific targets or specific topics is going to be very

important and no one wants to meet just to meet.

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MR. WALKER: That's exactly right. What I've got -- why don't we just change it this way then. That the committee recommends that the Executive Director collect names of potential advisory committee members, to be convened at later dates and that way we can start collecting a pool of those names and there's no definition of how we will or won't make a schedule of those meetings.

MR. VANDERGRIFF: All right. Well, then, maybe then also add to that "and report back to the Board" so that the Board is involved enough to where we make sure that it happens. Basically, the way your motion reads at the moment is to just collect names. That's what it's going to read. You have no action on the end of it, if I

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understood your motion correctly, as you were amending it. So, you can do that very simply, collect names and report names -- Go ahead.

MR. BRAY: Mr. Walker, let me try this out for you.

MR. WALKER: All right.

MR. BRAY: Do you have that draft resolution in front of you?

MR. WALKER: Yes.

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MR. BRAY: Okay. In the second paragraph, where it's got the ordering provision and it's talking about the agency's Executive Director authorized to convene committees, including the advisory committees that are statutory --

MR. WALKER: As necessary?

MR. BRAY: The "as necessary" phrase seems to be the one that that implication that, Well, maybe that's not enough or that's what's the discussion's about. If you took those two words out, given that you meet monthly, given that your Executive Director is listening, given that he's responsive to you and understands your concerns and Mr. Roche's concerns, if you just took those two words out then he'd be obligated to convene the



1 committee in a manner that's practical and then the 2 second sentence is the one about collecting the names. 3 So, instead of adding words and trying to find 4 words, maybe just cut two words out and you'd be better, 5 which is what I've been trying to do. And that's what 6 I've got scratched out over here but then over here it's worded a little bit different and it doesn't work as well 7 as what it does over under the resolution, so --8 9 MR. CAMPBELL: Mr. Chairman, on the initial 10 motion, we should -- aren't we supposed to take a vote on 11 And you can't even really modify it since it came 12 from the committee and the committee's not here. Is that 13 correct? I mean, like we had to take action, vote it up 14 or down and then change the motion. MR. RODRIGUEZ: Question. How many was on the 15 committee? Wasn't there four? 16 17 MR. BRAY: Four on the committee. MR. RODRIGUEZ: One, two, three, four are here. 18 Three of the four are here. 19 Three. MR. BRAY: Ramsey's gone. 20 21 MR. RODRIGUEZ: Yes, but there's three of the 2.2 four here, so we've got a quorum. So we can change if we



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want to.

1 MR. VANDERGRIFF: You're having a recommendation from the committee but the Board could 2 3 still make a change to that. It's merely a 4 recommendation coming from the committee. 5 MR. BRAY: That's right. 6 MR. VANDERGRIFF: I don't think there's an issue with us making a change to it. The question is, 7 what do we change it to. If you are comfortable with 8

MR. RODRIGUEZ: Okay.

probably get a vote.

MR. VANDERGRIFF: And I think, as Mr. Bray has pointed out, there's a fairly clear understanding of kind of the expectations and maybe this Board can come back, a meeting or two, and it can be more clarified in writing.

striking "as necessary" and want to proceed forward with

that, then you probably will get a second and you'll

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MR. WALKER: Well, then, the motion needs to come from me, at this meeting, not from the committee then. Is that correct? But the committee made the recommendation, which we presented as necessary and so how do we strike the word "as necessary."

MR. CAMPBELL: But you -- but we made a recommendation but you put it in the form of a motion and

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it was seconded so there's action that's got to be taken here. And then you can come back and change it.

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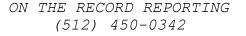
MR. BUTLER: Strike two words and I'll agree with that since I seconded it.

MR. VANDERGRIFF: Go ahead, Brett.

MR. BRAY: Excuse me. There are two ways to do it. One would be withdraw and withdraw and start over. The other is revise, he agrees and you move forward and as to the -- what you did was made a committee report and recommendation. Any Board member can then take -- can run with that and say -- and move to reject, to accept, to do whatever.

So, what you have on the floor is your motion and if the two of you agree to modify, you can do that, on the fly and then vote on it.

MR. WALKER: I would like to modify the recommendation to the Board and the following proposal would be as follows: It is therefore ordered by the Board that the agency's Executive Director is authorized to convene committees, including advisory committees authorized by the Transportation Code, Section 1001.031. The Executive Director is further authorized to collect names of potential advisory committee members and create committees as needed by the agency.



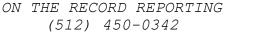


1 MR. BUTLER: I agree with that motion and 2 second. 3 MR. VANDERGRIFF: Do we have any further discussion? Then, raise your right hand in support of 4 the motion. 5 6 (A show of hands.) MR. VANDERGRIFF: The motion carries of those 7 8 here, unanimously. Again, Mr. Ramsay Gillman, Cheryl 9 Johnson and Victor Rodriguez are absent. So, thank you very much Mr. Roche. 10 (Simultaneous discussion.) 11 MR. VANDERGRIFF: Is Mr. Walker through? 12 13 MR. WALKER: Do you want more? 14 MR. VANDERGRIFF: Why did I ask? I don't know. I don't want to. 15 MR. WALKER: have one other thing that we also went over. 16 17 addressed facilities, management and what we decided to do there was we decided to appoint a subcommittee of the 18 19 Projects Committee and that person to -- which will be Ramsay Gillman -- and he has graciously volunteered to 20 21 take that position, with excitement, and he is going to 2.2 go and investigate and get with our staff and our 23 Executive Director and to look into what the needs may be

of the agency going forward and to find out what kind of

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consolidated abilities and what kind of home we will need and then pursue it from that standpoint down the road, s those needs arise. And that is my report, Mr. Chairman.

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MR. VANDERGRIFF: Thank you very much, Mr. Walker. We've obviously covered the advisory committee and also the action item that was on 4.4. I don't know if we have any further from the Executive Director?

MR. SERNA: No sir, nothing further from me. We'll go to the next agenda item.

MR. VANDERGRIFF: Why don't we skip the Employee Recognition to the end and we've got two more action items, which is the DMV and TxDOT Memorandum of Understanding. Mr. Serna.

MR. SERNA: Very quickly, we're in negotiations with and we've briefed the Finance and Audit Committee yesterday. We're in negotiations with TxDOT to execute a Memorandum of Understanding for fiscal year 2011. We have a few items that we still need to resolve but I think we've made significant progress and are the cusp of getting that resolved.

MR. CAMPBELL: Mr. Chairman, if I could, based on yesterday's discussion we've had -- Finance & Audit Committee concerning 2011 MOU between TxDOT and our agency, I would move that the Board authorize the

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Executive Director to finalize and execute that 1 2 agreement. 3 MR. VANDERGRIFF: All right. Do we have a 4 second? 5 MS. MARZETT: Second. 6 MR. VANDERGRIFF: A second from Ms. Marzett. Any discussion? Seeing none, I would call for your vote 7 and approval by raising your right hand. 8 9 (A show of hands.) MR. VANDERGRIFF: Motion carries unanimously of 10 11 those present. 12 And the last item that we have on the agenda 13 for action item is the State Auditor's Office Examination and Audit. 14 15 Mr. Serna, again to you. MR. SERNA: Very quickly, there's really not an 16 17 action item on this. This is more just a report to the Board and the public that the state auditor's office has 18 19 initiated their review of the department, as required in House Bill 3097. This is a baseline audit that they will 20 21 be conducting. It is a full-blown audit, it's a baseline 2.2 audit to help us identify funds, other issues, funds



transfers, property transfers, personnel and other

issues, as described in House Bill 3097.

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We've had a couple of meetings with the auditor's office. We understand that their key contact on the Board is the Chairman of Finance and Audit Committee and I believe they've met with Chairman Campbell and we move forward working with them. Their projected completion date for that audit -- they've already started it and the projected completion date for that audit is August of this year. That's all I have to report.

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MR. VANDERGRIFF: All right. Great. And, last, seven hours later, just about, is -- but certainly not least of what we have to do today is we have noted an employee recognition. This will be the last Board meeting that we will have Rebecca Davio with us from the -- the Division Director of VTR.

SPEAKER: Did she leave?

MR. VANDERGRIFF: She left. Okay. Well, please tell her, Mike, that that \$5,000 check we had in here in the file, it is going directly to your account. So. No, obviously, we wanted to acknowledge her great work in both as the Divisional Director at VTR within TxDOT and within the Department of Motor Vehicles but also the key role she played in the start-up of the



agency and the energy and enthusiasm and the zest for it that she had in pushing this agency forward.

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And so we do want to note that we have a certificate of appreciation that we would be presenting to Rebecca, that your contributions have been valuable to the advancement of the Vehicles, Titles and Registration Division and to ensuring the smooth transition from the Texas Department of Transportation to the Texas Department of Motor Vehicles.

MR. WALKER: Well, here she is; she's back.

MR. VANDERGRIFF: You missed -- we cashed the \$5,000 check that you had. You missed all the nice words. I'm not sure I can say them again. But -- no, we -- the last and certainly not least thing on our agenda was to recognize your outstanding contributions. Rebecca, your outstanding contributions to the VTR Division, as the Divisional Director, both inside of TxDOT and in the DMV but also the energy, zest, enthusiasm, creativeness that you brought to getting the Department of Motor Vehicles off the ground and we will sorely miss you. We wish you well, obviously, with the Department of Public Safety and the Driver's License Division and I will look so forward to telling

legislators, when they ask me about fixing it, that I 1 know exactly who to call to get that done right now. 2 3 But, anyway, we had a Certificate of Appreciation and I'll read it again. I think we had, I 4 5 think, more to come shortly but the Certificate of 6 Appreciation: The Board presents this certificate to Rebecca Davio, whose contributions have been invaluable 7 to the advancement of the Vehicles Titles and 8 9 Registration Division and to ensuring the smooth transition from the Texas Department of Transportation to 10 11 the Texas Department of Motor Vehicles, so we thank you 12 very much for your service. 13 (Applause.) MR. VANDERGRIFF: Rebecca, you're without 14 words. That's the first time I've ever seen that. 15 MS. DAVIO: I'm saving them for later. 16 17 MR. VANDERGRIFF: And, with that, does any Board members have any additional business they'd like to 18 19 bring up? So, thank you very much for attending. that, we are adjourned. So moved, seconded. 20 21 (Whereupon, the Board meeting was adjourned at



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4:00 p.m.).

1 CERTIFICATE 2 MEETING OF: 3 Texas Department of Motor Vehicles Board 4 LOCATION: Austin, Texas May 13, 2010 5 DATE: 6 I do hereby certify that the foregoing pages, numbers 1 through 201, inclusive, are the true, accurate, 7 and complete transcript prepared from the verbal recording 8 made by electronic recording by Joe Schaefer, before the 9 Texas Department of Transportation. 10 11 12 13 14 15 16 (Transcriber) 17 18 19 On the Record Reporting, Inc. 20 3307 Northland, Suite 315 21 Austin, Texas 78731 22 23

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